

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB - REGISTRY OF MWANZA

AT MWANZA

LAND APPEAL NO. 43 OF 2022

(Arising from District Land and Housing Tribunal for Ukerewe Application No. 02 of 2021)

SIJALI MSUMBWA-----APPELLANT

VERSUS

JACOB BIHEMO LUKONGE-----RESPONDENT

JUDGEMENT

Feb. 20th & 23rd, 2023

Morris, J

This appeal is against the judgement and decree from the District Land and Housing Tribunal for Ukerewe (DLHT). Grounds of appeal are that:

1. The district tribunal erred in law and fact by not issuing summons to call the appellant's witness hence denied him right to be heard.
2. The district tribunal erred in law and fact by failure to evaluate evidence on record and disregard the evidence of the appellant herein.
3. The district tribunal erred in law and fact by ordering the appellant to pay Tshs. 1,000,000/= as general damages without the same being pleaded and prayed by the respondent.

4. The district tribunal erred in law and fact by ordering the appellant to pay excessive general damage of Tshs. 1,000,000/=.
5. The district tribunal erred in law and fact by ordering the appellant to pay Tshs. 1,580,000/= as arrears of rent without the same being proved.

When the matter was fixed for hearing, the appellant was represented by Advocate Inhard Mushongi. The respondent appeared in person. Mr. Mushongi abandoned the 4th ground of appeal. However, he successfully prayed to add one more ground of appeal, to wit, that the trial tribunal was wrong to close the appellant's case. The counsel submitted regarding the 1st and additional grounds of appeal that the trial tribunal denied the appellant's prayer for summons to call his witness. Instead, thereof, the tribunal closed the defence case. To him, this step was wrong in law.

In line with the foregoing, the appellant's counsel submitted that the role to close the case is cast on the parties not the court or tribunal. He cited the case of ***David Mushi v Abdallah Msham Kitwanga***, CA Civil Appeal No. 286/2016 (unreported). While making reference to page 17 of



the tribunal proceedings; the counsel argued that the tribunal's unilateral closure of the appellant's case contravened his right to be heard.

Regarding the 2nd ground, Mr. Mushongi submitted that at page 13 of the typed proceedings, the appellant testified to have paid rent and the outstanding balances by then. It is on record that, he admitted being indebted to the tune of Tshs 300,000/=. However, the judgement (pages 6 & 7) bears the fact that the issue as to whether or not the appellant was paying rent; was answered by using evidence of the respondent alone.

For the 3rd ground of appeal, the counsel submitted that the tribunal wrongly awarded Tshs 1 million to the respondent as damage but no reason was provided for such grant. That is, the respondent did not prove the subject damage. The Court was invited to refer to the case of ***Anthony Ngoo and Another v Kitinda Kimaro***, CA Civil Appeal No. 25/2014(unreported); in which the Court of Appeal insisted that the court should assign reasons for awarding general damages.

As to the 5th ground, he submitted that, the amount of Tshs. 1,580,000/= was not proved by respondent. Thus, (at page 8 of

proceedings) the evidence indicate that the appellant paid Tshs 220,000/= for 2016. Consequently, the arithmetic is wrong somewhere for Tshs 1,580,000/= is not justified from the given variables. He then prayed the appeal to be allowed with costs.

In his reply, the respondent submitted that the appellant said to have 2 witnesses: his wife and chairman of the hamlet. Parties were given 2 months' adjournment. On the scheduled date, the appellant attended without any of the mentioned witnesses. He claimed that witnesses demanded to be served with summons to appear. Consequently, the tribunal decided to close the case.

Regarding the 2nd ground, he submitted that the tribunal was justified. That, the appellant stated the rent to be Tshs 25,000/= per month totaling 300,000/= per year he also testified to have been paying 50,000/= per month yielding 600,000/= annually. However, the tribunal based on the former rental, hence justice prevailed. In respect of the 3rd ground, he was of the view that the appellant stayed at his house since 2014 to 2016. His house deteriorated. When he asked the appellant to leave so that he would



renovate it but the latter refused to heed. He insisted that he would stay enough to move to his own house. The breach was in 2016. He was ordered by Ward Tribunal to pay rent which he did not pay fully. He paid Tshs 220,000/=. So, he was indebted at Tshs 80,000/= to make full rent of 300,000/= for 2016. The appellant vacated in 2021. In between (2017-2021) he did not pay a penny. At the tribunal, the exhibit was tendered to such position. That the appellant did not pay rent nor did he give vacant possession of the premises.

Regarding the 5th ground he submitted that the Tshs 1,580,000/= awarded as outstanding rent was correct. That, it tallies with the duration he stayed in the house without paying any rent that's 5 years. In figures, $300,000 \times 5 (+80,000)$. And that he suffered general damages. In a brief rejoinder, Mr. Mushongi submitted that the Respondent states things which are not in proceeding hence they should be ignored. He then reiterates the respondent's prayer.

As the 1st and 6th additional grounds of appeal would suffice to dispose of the appeal, I will firstly deal with both. On his part, Mr. Mushongi is

faulting the trial tribunal for denying the appellant right to be heard when it refused to give him summons to call witness it decided to close hearing of the case. The respondent was of the view that the due to the appellant's conduct and delay to call witness the trial tribunal was justified to close the case.

It is cardinal principle enshrined in Article 13 (6) (a) of ***the Constitution of the United Republic of Tanzania***, 1977 that every person is entitled to be afforded with fair hearing. I think fair hearing shall be extended to the parties right to call witness. Failure to afford the right of fair hearing renders the decision against such party a nullity. In the case of ***Tanzania Commercial Bank Plc (Successor in title to TPB Bank PLC) v Rehema Alatunyamadza***, CA Civil Appeal No. 155 of 2021 (unreported). The Court stated (at page 6) as follows;

"...an adverse decision made without giving the affected person a hearing is null and void for breaching a fundamental principle of natural justice. That is the essence of Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977..."

The same position was reinforced by Court of Appeal in case of ***Mufindi Paper Mills Limited v Ibantu Village Council and 3 others***, Civil Revision No. 155/17 of 2019 and ***Georgio Anagnostou and Another vs. the Attorney General and 2 others***, Civil Application No. 210/01 'B' of 2019 (both unreported). In this case, not only the appellant was denied his right to a fair hearing but also the court closed his case. As rightly submitted by the appellant's, counsel this anomaly was fatal.

In the case of case of ***David Mushi v Abdallah Msham Kitwanga***, CA Civil Appeal No. 286/2016 (CAT-unreported), cited by the appellant's counsel, the court referred to the case of ***Abdallah Kondo v R***, Criminal Appeal No. 322 of 2015 (unreported) where it was observed that the parties are at liberty to close their respective cases after being satisfied with sufficiency of evidence. Therefore, for the trial tribunal to close the appellant's evidence was in violation of such fundamental principle of fair hearing.

In the final conclusion; I uphold the 1st and 6th (additional) grounds of appeal. Consequently, I quash the trial tribunal's order of closing the appellant's case on 25th May 2022; and the consequential judgement and decree therefrom. I further order for the file to be remitted to tribunal to proceed from the stage



where the order of 25th May 2022 had not been given. As the discussed grounds above dispose of the appeal; I will not venture to hear and determine the remaining grounds of appeal. I make no order for costs.

It so ordered.

Right of appeal fully explained.



C.K.K. Morris

Judge

February 23rd, 2023