IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT ARUSHA

LAND APPEAL NO. 100 OF 2022

(Appeal from Judgment and Decree of the District Land and Housing Tribunal for Arusha at Arusha, Application No. 225 of 2020)

BETWEEN

THE REGISTERED TRUSTEES OF ISHIK MEDICAL

AND EDUCATIONAL FOUNDATION.....APPELLANT

VERSUS

SHEILA S. KAUNDA.....RESPONDENT

JUDGMENT

Date of Last order: 18/07/2023

Date of Judgment: 11/09/2023

MWASEBA, J.

Being aggrieved by the judgment and decree of the District Land and Housing Tribunal of Arusha at Arusha, the appellant filed his appeal to this court armed with the following grounds:

i) *That the Learned Chairperson erred in law and fact in finding that the appellant herein who was the respondent in the trial tribunal breached the Lease Agreement whereas there was an expiration of Lease Agreement due to efflux of time.*

ii) *The Learned trial Chairperson erred in law and fact in finding that the Appellant herein was obliged to issue the three-month notice on the intention of not continuing with the contract an issue that is not stipulated in the lease agreement.*

iii) *The Learned Chairperson failed to evaluate the evidence on record and arrived at a wrong conclusion/finding that the Respondent herein entitle to be paid USD 17,000 with neither proof nor legal justification.*

iv) *The Learned Chairperson erred in holding that the Appellant herein has failed to comply with the Lease Agreement without highlighting any clauses which were breached by the Appellant.*

v) *The learned Trial Chairperson erred in law and facts in finding that the PW2 was a qualified Quality Surveyor without any proof that he is eligible to issue the surveyed report.*

Briefly, the appellant herein was a tenant of the respondent at Plot No. 106 Block "Z" Low Density Corridor Area, Arusha City under the contract of three years from 1st July, 2017. On 22nd June, 2020, one month before the end of their contract the respondent received an email titled "Notification of end of Lease and Non-Intention to Renew". The respondent was not happy with the said notice hence she filed an

application at Arusha DLHT which was admitted on 2/12/2020 claiming for specific damages at the tune of USD. 17,000, General Damages at the tune of USD. 15,000 court interest at the tune of 12% from the date of filing to the date of payment and costs of the application.

Having heard both parties and their evidence submitted at the tribunal, the application was allowed with costs. The appellant was ordered to pay the respondent USD 17,000 and the court interest 12% from the day of filing the application till the day of payment in full. Aggrieved by the said decision, the appellant is now before this court challenging the above decision based on the grounds advanced herein above.

During the hearing of the appeal, Messrs Hussein B. Sokoni and Ngereka E. Miraji, both learned Counsels represented the appellant and respondent respectively. The appeal was disposed of by way of written submission.

Supporting the appeal on the 1st ground, Mr. Sokoni submitted that Clause 6 (d) of their contract which was relied by the tribunal was not binding to the parties due to the fact that the appellant did not terminate the lease, but it came to an end due to efflux of time. He argued further that the monetary terms granted to the respondent is not acceptable in the eyes of the law. Adding to the above, it was his

submission that the appellant did not intend to renew the Lease agreement as per Clause 6 (e) of the Lease Agreement. Therefore, all title, rights and interests of the lease ceased to exists upon the efflux of time. He supported his argument with a number of cases including the case of **Tiopaizi v. Bulawayo Municipality** (1923) AD 317 at 325.

Coming to the 2nd ground of appeal, Mr. Sokoni Complained that as the parties were aware that the lease agreement will be expired by efflux of time, there was no need nor clause which needed a three month notice to be given to the respondent. His argument was supported with the case of ***Barclays Bank (T) Ltd v. Jacob Muro***, Civil Appeal No. 357 of 2019 (Unreported).

Submitting on the 3rd ground of appeal, Mr. Sokoni argued that the trial tribunal awarded USD 17,000 to the respondent as arrears without any proof which required in specific damages. As the Lease Agreement expired due to efflux of time, the respondent was not supposed to be paid any damages. He referred this court to **Section 64A (2), (3) and 100 of the Evidence Act,** Cap R.E 2019, cited a number of cases including the case of **Harith Said Brothers Company v. Martin Ngao** [1987] TLR 12 to bolster his argument.

It was his further submission that even exhibit P5 was admitted without considering its authenticity as it did not have signature, stamp, and date when the parties signed it which is contrary to **Rule 49 (2) of the Architects and Quantity Surveyors (Registration) Act**, GN No. 337. More to that, being electronic evidence, the exhibit P5 was admitted contrary to **Section 64A (2) and (3)** of the Evidence Act. He complained further that, even Exhibit P2, P3, P4 and P5 were retrieved from the computer without complying with the law. He cited the case of **Emanuel Godfrey Masonga v. Edward Franz Mwalongo and Two Others**, Misc. Civil Cause No. 6 of 2015 (HC-Unreported) to substantiate his argument and prayed for the appeal to be allowed with costs.

On the other hand, Mr. Miraji strongly opposed the appeal. On the 1st ground of appeal, he replied that as per their Lease Agreement, clause 4 (c) there had to been a three months' notice of joint inspection prior to the expiration of the said lease to identify defects and damages done by the tenant. However, the appellant breached that agreement, and he is now refusing the amount agreed upon after the breach of the said Lease agreement by failing to perform what was agreed by both parties. He distinguished the cases cited by the learned counsel for the appellant that the Lease expired. Their claim is that the respondent failed to

perform some obligations before the expiration of the said lease agreement. He supported his argument by citing **Section 37 (1) of the Law of Contract Act**, Cap 345 R.E 2019 and the case of **Miriam E. Maro v. Bank of Tanzania**, Civil Appeal No. 22 of 2017.

Responding to the 2nd ground of appeal Mr. Miraji submitted that, counsel for the appellant failed to state what was not part of the pleadings hence, this ground lacks merit.

Regarding the 3rd ground of appeal, Mr. Miraji submitted that at the trial tribunal the appellant admitted that they did not do any renovation and the premises were not the same as before. Therefore, the respondent was awarded to restore the premises to its original position before the agreement. In proving her allegation, the respondent summoned PW2 (Professional quantity surveyor) who inspected the premise and reported the extent of damage caused by the appellant. Therefore, the evidence was well analysed by the trial tribunal. He distinguished all the cases cited by the appellant as they mislead the court regarding the truth of the matter. In the end, he prayed for the appeal to be allowed with costs.

In brief rejoinder, the appellant reiterated what had already been submitted in his submission in chief.

Having heard the submissions made by both counsels, the issue for determination is whether the appeal is meritorious.

Starting with the 1st and 4th grounds of appeal, Mr. Sokoni submitted that it was wrong for the trial tribunal to hold that the appellant was in breach of the Lease Agreement while the lease expired due to efflux of time. On his side, Mr. Miraji argued that it is not in dispute that the Lease Agreement expired, however the appellant failed to perform the terms of the Lease Agreement prior to the expiration of the Lease agreement such as inspection and renovation of the premise.

I have revisited the records of the trial tribunal, particularly the Lease Agreement entered between the parties herein and noted that as per Paragraph 6 (a) of the Lease Agreement (Exhibit P1) it was the respondent (the land lady) who was supposed to issue a three month notice of inspection to the appellant. The records show that the same was vividly complied with as demonstrated through exhibit P5 which was the Building Inspection Report. I am saying so because, as per this report it appears that the same was conducted after consultation of the parties through the letter dated 21st September, 2020 where the appellant agreed with the proposed dates of joint inspection by the respondent. In fact, it is the observation of this court that the issue as to

whether joint inspection was conducted by both parties or not was not contested at the trial tribunal due to the fact that the respondent stated that the inspection was conducted, the appellant also through her witness one Ramadhani K. Ramadhani who on cross examination by Mr. Miraji admitted that inspection was conducted and that he was also present during the said inspection. That being said, as far as the issue of whether the inspection was conducted is concerned, this court answers it in affirmative and thus no breach occurred. Thus, this ground is with merit.

Coming to the 2nd ground of appeal, the appellant complained that the trial tribunal erred in law to hold that the appellant was obliged to issue three months' notice to the respondent on the intention of not continuing with the contract. I have revisited the records of the trial tribunal and noted that paragraph 6 (e) of the Lease Agreement (Exhibit P1) provides that:

> "***If the Tenant shall be desirous of taking a new lease of the demised premises after the expiration of the term hereby granted***, *he/she shall deliver to the Landlady or leave or send by registered post to their last known address in Tanzania,* ***notice in writing of not less than three months before the expiration of the term hereby granted***, *and the Rent that the parties*

hereto shall have mutually agreed, but subject in all respects to the same terms and conditions herein contained, the present clause expected." (Emphasis added)

As shown by the cited clause, a three-month notice was supposed to be issued to the respondent if the appellant had an intention to have another lease agreement after the expiration of the lease agreement. Therefore, so long as the appellant had no intention to proceed with the lease agreement, he was not obliged to issue to the respondent any notice whatsoever. Thus, this ground too is found with merit.

Regarding the 3rd ground of appeal, Mr. Sokoni complained that the trial tribunal awarded USD 17,000/= to the respondent without giving justification and reasons for such award. He went further complaining that even AW2 (Quantity Surveyor) did not prove that he was qualified personnel to conduct inspection and issue a report there after.

I have revisited the record of the trial tribunal; it is with no doubt that the trial tribunal issued the specific damages contrary to the rules governing the award of specific damages. I am saying this on the reason that reading from the trial tribunal judgment at page 6 it was held as follows:

"Mdaiwa anapaswa kulipa matengenezo ya nyumba kwa kiasi cha USD 17,000"

However, there is no justification on how the trial tribunal arrived at the said costs of renovation. This is due to the fact that Exhibit P5 (a report of Quantity Surveyor) is only the estimation of the costs that was to be incurred in renovating the premises which is Tshs.18,198,300.00/=. Moreover, it is the principle of law that special damages must be specifically pleaded and proved as it was held in the case of **Zuberi Augustino v. Ancent Mugabe** (1992) TLR 132 that:

"It is trite law that special damages must specifically pleaded and proved"

The same position was equally stressed in the case of **Bolag v. Hutchson** (1950) A. C. 515, at page 525 that:

"What we accept special damages are such as the law will not infer from the nature of the act, they do not follow in the ordinary course. They are exceptional in their character and therefore, they must be claimed specifically and proved strictly."

Therefore, this court do agree with Mr. Sokoni that the amount of USD 17,000 was not proved as required by the law. However, exhibit P5 (a report of Quantity Surveyor) suggests that the premises had the defects. More so, the appellant herein did not dispute the fact that at the time of

the expiration of the Lease Agreement, the said premises were not in the same status as they were at the time of Leasing. Impliedly, the appellant herein agrees that there are costs for renovation which he is obliged to pay as per the terms of the Lease Agreement. That being the case, it is my considered view that relying on the building inspection report issued by the Qualified Quantity Surveyor, the estimated amount of Tshs. 18, 198,300/= was proved to the extent of costs of renovation and the appellant herein is required to bear such costs.

Regarding the allegation that there was no proof that a surveyor was not eligible and he submitted no proof, the same was supposed to be challenged at the trial tribunal and not at this stage. The appellant was supposed to cross examine the said witness on his qualification. This was well stated in the case of **Rashidi Sarufu v. The Republic**, Criminal Appeal No. 467 of 2019 (CAT sitting at Iringa, reported at Tanzlii) that:

> *"It is trite principle that failure to cross examine a witness on an important matter amount to acceptance of the truth of evidence of that witness."*

For the foregoing reasons, this appeal is partly allowed to the extent explained above. The appellant herein has to pay the respondent costs of renovation to the tune of Tshs. 18, 198,300/=. Considering the fact

that this appeal is partly allowed, each party will bear his/her own costs of this appeal and that of the trial tribunal.

It is so ordered.

DATED at **ARUSHA** this 11th day of September, 2023.

N.R. MWASEBA
JUDGE