IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 80 OF 2018

(*Arising from application no. 91 of 2016 of Ilala District Land and Housing Tribunal*)

SALEHE SURUR .....APPLICANT

VERSUS

TANZANIA SCOUTS ASSOCIATION ..... RESPONDENT

JUDGMENT ON APPEAL

S.M. MAGHIMBI J.

In this judgment the appellant was dissatisfied with the decision of the District Land and Housing Tribunal for Ilala ("The Tribunal") in Land Application No. 91/2016 ("The Application") which was decided in favour of the respondent. He has lodged this appeal on only two grounds that:

1. The Honourable Chairperson erred in law and in fact in deciding that the appellant is not a lawful tenant of the suit premises.
2. The Honourable Chairperson erred in law and in fact in ordering the appellant to vacate the suit premises and of payment arrears of rent of USD 280 per month as from January, 2018 to date of vacating and also to pay costs of the respondent.

The appellant prayed that the appeal is allowed with costs. In this court, Mr, Charles Semgalawe, learned Counsel represented the appellant while Mr. Mathiya, learned Counsel represented the respondent. The appeal was disposed by way of written submissions following a court order dated 15/08/2019.

Before going into the merits of the appeal, the records reveal the brief background of this case to date back in 2015 when the appellant and the respondent entered into a lease agreement for renting of an open space area measuring 56 M^2 to the appellant for running a garage business. According to EXD1, the lease agreement, the property was located on Plot No. 1078, Malik Road at Upanga, in Ilala Municipality within Dar-es-salaam City. The lease was for a period of one year starting from the 01/01/2015 to end on the 31/12/2015.

As per the records, vide EXD2, on the 09/03/2015 the respondent informed the appellant of his being moved to another place to proceed with business, since this fact was not at issue during trial, it seems the appellant was moved to the current disputed plot situated at Plot No. 21 Isevya/Kibasila, Ilala area within Dar-es-salaam city. Upon the lease coming to an end, the respondent started demanding empty possession from the applicant and sent the applicant Notice to vacate dated 11/04/2016 which was received by the appellant on 15/04/2016 (EXD4). Following the notice, on the 21/04/2016 the applicant filed the application at the tribunal seeking for orders to declare him the lawful tenant of the respondent, an order for continuance of the lease as per agreement, costs of the application and other reliefs which could be granted by the tribunal. The respondent disputed this fact insisting that the appellant was not their lawful tenant from January 2016. Having heard the parties' evidence, the tribunal decided in favor of the respondent dismissing the application hence this appeal.

The first ground of appeal is that Chairperson erred in law and in fact in deciding that the appellant is not a lawful tenant of the suit premises. In

his submissions drawn and filed by Mr. Lugaila, learned advocate, he submitted that, the appellant is the lawful tenant of the suit premises and the respondent had only been interfering/breaching the terms of contract. That there was contract signed in December 2014 for the lease to commence from 1st January, 2015 to December, 2015 but to his surprise the Respondent issued notice to vacate on 09th March, 2015 (exhibit D-1 and D- 2).That the Respondent started to breach terms of contract before the contract came to an end, and even after the end of contract when the case has been filed, the appellant has been paying rent regularly(exhibit P-1) with belief that he was still the respondent's tenant.

Mr. Lugaila argued that when DW1 was cross examined on EXD2 during trial, his response was that the letter was only used as a warning while the wording in it suggested otherwise. He submitted further that from the evidence presented before the tribunal, it clearly shows that the respondent's principal officer had started to breach the terms of the contract way back before it came to an end. That after the end of the EXD1, the respondent through her commissioner has been having subsequent contract which made the applicant believe that the lease contract still remains intact and that is why he was paying the rents regularly (EXP1). That when DW1 was asked about these money paid, he said that the money was paid to cover the previous rents but there was no evidence produced to support the allegation.

In reply, Mr. Mathiya submitted that this ground should not burden us much because it is not in dispute that after expiry of one year lease agreement that was signed in December 2014, there were no any other agreement reached between the parties or any renewal made. He argued

that Exhibit D-2 was not a demand notice but rather for the appellant to shift to the area legally leased to him as the heading of the letter reads "kuhamia eneo ulilopimiwa". That despite being served with the notice to vacate, the appellant was adamant and continued to occupy the premises without consent of the Landlord hence deposited the rent for the year 2017 without respondent's consent. That the Chairman was right to correctly consider the payment made in 2017 as rent for that year that is why she ordered the appellant to pay rent for the year 2018 and subsequent days until he vacates.

Having heard the submissions of both sides and as per the records of the appeal, I agree with Mr. Mathiya that the first ground is not much to be labored on. It is undisputed fact that the lease agreement (EXD1) which was the subject of the dispute at the tribunal was for a period of one year. The terms of the contract were clear on clause 2 that there was no automatic renewal of the lease and the renewal was specifically in the sole discretion of the lessor (the respondent). The lease was for the period of one year to terminate on the 31/12/2015. There is no evidence tendered by the appellant to show that after the expiry of the said period, the lease was renewed.

It is also pertinent to note that Mr. Lugaila is trying to mislead the court on the evidence that was tendered before the tribunal. He alleges that the respondent started disturbing the appellant to vacate the suit premises from March 2015, an allegation which is not backed by any evidence. Instead, as correctly pointed out by Mr. Mathiya, the EXD2 was a notice informing the appellant to shift to another premises allocated to him by respondent that is why I pointed out in the background of the case that

the EXD1 was talking of another premises whereby the appellant by the EXD2, was moved to the current suit property, hence that was not an issue at the trial. Suffice is to say that there is no proof that the respondent started disturbing the appellant in March 2015.

Baack to the substance of the ground of appeal, there is also EXD3, which is a letter from the applicant agreeing to vacate the suit premises by December 2015 and EXD4 which is a notice by the respondent to the applicant requesting him to vacate the suit premises. The notice is dated 11/04/2016 and received on 15/04/2016. Having received the notice the applicant ran to the tribunal and filed the application, got an injunction and has been in occupation of the premises without consent of the respondent ever since. All this evidence is sufficient to conclude that the appellant's lease tenure ended in December 2015 and the efforts to have him hand over vacant possession of the suit premises has been hindered by the appellant due to existence of the matter at hand.

I have noted that the appellant has attempted to establish that the respondent has been receiving rents from him vide collective EXP1 arguing that there has been subsequent agreements. This argument is baseless since as I have mentioned above, there is no proof by the appellant that there was an extension to the lease agreement.

I have further analysed the collective EXP1 and found that the rental payments were made in 2017 which is a year after the current suit was filed. Furthermore, Mr. Lugaila pointed out that DW1 testified that the rents were arrears and put the burden of proof that there were arrears of rent on the witness. But the opposite is the correct way, if the appellant alleged to have paid the rents on the non-existing lease agreement, he is

the one who had the burden to prove that all his previous rents were paid and that there were no dues and then convince the court that the payments in collective EXP1 was actually for the subsequent rents and not the preceding ones. Since he did not do so, the burden cannot shift to the respondent.

In conclusion of the first ground of appeal, I find that the evidence of the appellant during trial could not prove that after the termination of EXD1, there was a subsequent lease between the parties or by conduct, there was an extension of that lease. The first ground of appeal therefore has no merits and it is hereby dismissed.

Going to the second ground of appeal that Chairperson erred in law and in fact in ordering the appellant to vacate the suit premises and of pay arrears of rent of USD 280 per month as from January, 2018 to date of vacating and also to pay costs of the respondent; I must point out that because the first ground of appeal was dismissed, the part of the ground challenging the order to vacate the suit premises automatically fails. Since the appellant was not a lawful tenant of the respondent, there is no other option but to order the illegal occupant to vacate the suit premises. Therefore that part of the order of the tribunal is not faulted. My determination of this ground shall only be on the part of the ground where the appellant challenges the order for payment of arrears of rent of USD 280 per month as from January 2018 to date of vacating and the order for costs of the respondent.

In his submissions, Mr. Lugaila submitted that he was the one who knocked tribunal's door to have his grievances heard and paid the fees as required for institution of application, the respondent only submitted his defense to convince the Tribunal not to grant the order sought. He argued

that the Tribunal had to either grant the prayer sought or not and if the respondent had its claim it could have raised it through Counter claim and upon paying the required fees and upon producing the evidence on the counter claim. Further that the tribunal granted orders that was never sought for in the first place and that even if it was pleaded it could do so by way of counterclaim which was not filed by the respondent to show the money owed and that the respondent only prayed for the tribunal to decide the opposite of what was prayed for. That there are no any rent arrears owed (paragraph 5 of the applicant/appellant application) which has been noted by the respondent on para 3 of the written statement of defense but the chairperson went further to grant an order that had not been pleaded. He cited different authorities to that effect including the case of the Supreme court of India in the case of ***Bachar Nahar v Nilima Mandal & others, civil Appeal No. 5798-5799 of 2008*** which held that,

> *"the jurisdiction to grant relief in civil suit necessarily depends on the pleadings, prayer, court fee paid, evidence let in etc"*

He further cited the case of ***Galaxy Paints Co. LTD v Falcon Guard ltd (2000) EA 885*** where the court held that:

> *"The issue of determination in a suit is generally flowed from the pleadings and a trial court could only pronounce a judgment on the issue arising from the pleadings..... unless the pleadings are amended, the parties were confined to their pleadings."*

He then argued that in the current appeal, the issue of payment of rent was never pleaded anywhere by the respondent at the tribunal therefore it was wrong for the Chairperson to make such order since it was not pleaded. He prayed that this ground is allowed.

In reply, Mr. Mathiya submitted that the gist of the Application filed at the Tribunal was to bar the land lord from evicting the appellant from the suit premises and declaring him lawful tenant. That in absence of the valid lease agreement, the Tribunal made decision that the Appellant should vacate the premises in dispute and since there were some payments made in 2017 during the pendency of the case at the tribunal, the tribunal was right to order payment of the rent for the period that the Appellant has illegally occupied the suit premises, under provision of section 82(1) of the Land Act cap 113 R.E 2002 ("The Land Act").

He submitted further that the respondent, under para 7 of his defense, prayed for the Tribunal to order any other relief as it may deem fit to grant. Therefore the order to pay rent arrears and vacation (sic) from the suit premises originated from the said paragraph, and the chairperson was correct in determining so. He posed a question whether the court could grant any relief to the respondent under the said prayer. He argued that under the **Mogha's Law of Pleadings,** the authors are of the view that the court has power to grant any general or other relief as it may think just, to the same extent as if it has been asked for, provided that the relief should not be of an entirely different description from the main relief. Mr. Mathiya submitted further that when the applicant filed the case at the tribunal until when the judgment was delivered, he had only paid the rent until 2017 and nothing was paid to date. That the relief ordered are not different from the description of the main relief that the appellant is unlawfully occupying the premises and continuing with the garage business.

He cited the case **of Zuberi Augustine Vs. Anicet Mugabe (1992) TLR 137** to support his argument and submitted that in that case, having found

that the Respondent was somehow entitled to some relief, although he had failed to prove special damages, the court granted an award of Shs. 500,000/- under the prayer any other relief.

In rejoinder, Mr. Lugaila mainly reiterated on what he submitted in submission in chief and added that the case cited by the respondent have been used out of context of the matter at hand. That the party who knocked the door of the courts were the plaintiffs and it was wrong for the Tribunal to entertain the claims laid down by the respondent in his WSD. He added that, the respondent story has not been straight; it has been continuously changing on issue of when the contractual relationship ended. He therefore prayed that this honorable Court see merit on the appeal and allow the same with cost.

I have gone through the parties' submissions on this ground which challenges two orders of the tribunal, the order for vacant possession and the orders for payment of arrears of rent. I partly agree with Mr. Lugalia that the tribunal granted orders that were never sought for. In the Written Statement of Defence to the application, the respondent sought for the following orders:

i. *That this Tribunal be pleased to declare the applicant is not lawful tenant of this land on Plot No. 21, Isenya/Kibasila Area, Dar-es-salaam.*
ii. *Declaration that the lease agreement between the parties ended and expired since 31st December, 2015.*
iii. *Dismissal of the application with costs.*
iv. *Any other relief that this Honourable Tribunal may deem fit to grant"*

Clearly none of these prayers included a prayer for arrears of rent which relief was granted by the tribunal. The question is, as per the argument advanced by Mr. Mathiya, can these prayers be granted under the umbrella of "any other relief". He cited the case of **Zuberi Augustine** (Supra) to support his argument where the court awarded general damages of Tshs. 500,000/- when it found that the Respondent was somehow entitled to some relief, although he had failed to prove special damages. With respect to the learned Counsel, the situation in the case at hand is partly different.

I will start with the order for vacant possession which I agree that it may fall under the umbrella of any other relief.

To be specific, the relief of vacant possession is incidental to the main proved issue that the appellant was not a lawful tenant of the respondent. Therefore if someone is proven to be in unlawful occupation of the suitland, then the consequential order is to have that someone vacate the suit premises, an order that is consequential to the unlawful possession. The empty vacation is consequential to unlawful possession because you cannot declare someone to be in unlawful possession and still let him continue with the wrongful occupation, he has to vacate. Hence the part of argument of Mr. Lugalia that the court erroneously ordered the appellant to vacate the suit premises is without merits and is dismissed.

Going to the order to pay rent arrears; from the wording of the tribunal, the relief of arrears of rent was not granted under the umbrella of general damages, it was rather a specific relief which on page 5 of the typed judgment, the tribunal awarded under Section 82(1) of the Land Act, the Section provides:

> *"Where a lessee remains in possession of land without the consent of the lessor after the lease has been terminated or the term of the*

lease has expired, all the obligations of the lessee under the lease continue in force until such time as the lessee ceases to be in possession of the land."

From the provisions, the recovery of the obligations of lessee is therefore a cause of action of its own which should have been specifically pleaded and specifically proven by having the respondent prove the existence of the arrears and the appellant counteract the argument by showing that the arrears were not as such. On the other hand, the reliefs falling under the *"any other relief"* are those reliefs which are consequential to or ancillary to the main reliefs that were sought for and granted by the court. The order to pay specific obligations under the Land Act is not a consequential order because this has to be pleaded, proven and finally awarded. Even the records of the tribunal are clear that during trial, only two issues were framed for determination, whether the applicant is the lawful tenant to the Respondent premises and to what reliefs are the parties entitled to and not whether the respondent was entitled to any relief.

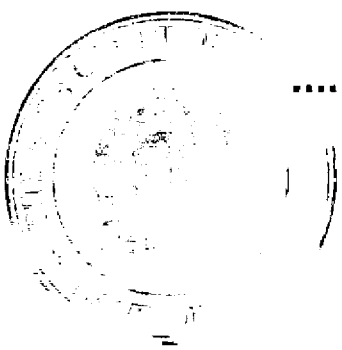
It is a trite law that court cannot grant any relief which was not claimed by the parties, and the party against whom the relief is sought should be given an opportunity to defend himself. I am in agreement with Mr. Lugaila that had the respondent been desirous to have the court order payment of arrears of rent, she could do so by lodging a specific claim on that either by a fresh suit or because there was already a dispute in court on the same subject matter, by way of counter claim under Order VIII rule 9(1) of the Civil Procedure Code cap 33 R.E 2002. The order provides:

"Where in any suit the defendant ***alleges that he has any claim*** *or* ***is entitled to any relief or remedy against the plaintiff in respect of a cause of action accruing to the defendant***

before the presentation of a written statement of his defense *the defendant may, in his written statement of defense, state particulars of the claim made or relief or remedy sought by him: ....."*

The cited provisions are self-explanatory. Since the arrears of rent is a claim the respondent believes to have against the appellant u/s 82(1) of the Land Act, then she was duty bound to advance the particulars of the claim to be specifically proved so that the appellant is afforded opportunity to defend himself. Otherwise awarding what was not pleaded and/or prayed for is an irregularity which renders the order futile. That said, the order of the tribunal that the appellate should pay arrears of rent to the respondent is hereby set aside. The remaining part of the appeal is hereby dismissed and for the sake of clarity, the appellant is not a lawful tenant of the respondent and he shall immediately hand over vacant possession of the suit premises to the respondent. Costs of this appeal shall be borne by the appellant.

Dated at Dar es Salaam this 12th day of May, 2020.



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S.M MAGHIMBI

JUDGE.