IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM

LAND APPEAL NO. 112 OF 2019

(From the Decision of the District Land and Housing Tribunal of Morogoro District, at Morogoro in Land Case No.21 of 2016)

CHRISTOPHER JOHN MWINAMI..... APPELLANT

VERSUS

LUCIAN ROCKY ATHUMANI.....RESPONDENT

JUDGMENT

Date of Last Order: 25.11.2021

Date of Judgement: 13.12.2021

OPIYO, J.

The appeal has its genesis in the District Land and Housing Tribunal of Morogoro District, here in after called the trial tribunal, vide the Land Case Application No.21 of 2016. At the center of the dispute between the appellant and the respondent above named is a landed property, registered as Plot No.324/31, Block Y, located at Vibandani street within Morogoro Municipality, here in after called the suit house, originally owned by the respondent. The same was later sold by the respondent to the appellant, that was on the 28th of June 2008 (see exhibit A.E.I) at the tune of 3,000,000/=tshs. It is further on record that, the respondent's family was against the sale, hence the respondent returned the purchase money in 2009 and the respondent continued to stay in the said house to date. Following her stay in the suit house, the respondent sued her among others for vacant possession before the trial tribunal and a payment of

rent arears of about 5,700,000/=Tshs. as the appellant has insisted that he rented the house to the respondent after he purchased it at 60,000 Tshs. per month. Therefore the 3,000,000 Tshs. paid by the respondent covered a lease period of 4 years and two months, ending on the 31st November 2012. After a full trial the trial tribunal gave the appellant the ownership of the suit property, but the respondent retained possession subject to be paid back her 3,000,000/=Tshs. Aggrieved by the said decision, the appellant filed the instant appeal on the following grounds:-

1. That, the District Land and Housing Tribunal erred in law and in fact for failure to order vacant possession of the suit property by the respondent.

2. That, the District Land and Housing Tribunal erred in law and in fact to order the appellant to pay 3,000,000 Tshs to the respondent as conditional precedent to repossess the suit house without considering the fact that the respondent was a mere tenant immediately after the said house was sold.

3. That, the District Land and Housing Tribunal erred in law and in fact for failure to award arears of rent to the tune of 5,700,000/=Tshs.

4. That, the trial tribunal erred in law and fact for failure to award costs of the suit and general damages to the appellant without assigning reasons.

The appeal was heard by way of written submissions. Advocate Cathbert Mbiling'i appeared for the appellant while the respondent enjoyed the

legal services of Advocate Patricia Pius Mbosa. In his submissions Mr. Cathbert stated that it is a common principle that a vendor must give vacant possession of the premises on completion of sale. The appellant needed the trial tribunal to order the respondent to vacate the house in dispute as she is no longer the owner of the same. But the chairperson just ended in declaring the appellant as the lawful owner only therefore he was wrong on his part. He cited the case of Galaxy Paints Co. Ltd versus Falcon Guard Ltd (2000) E.A 885, where it was observed that,

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

As for the 2nd and 3rd grounds, it was submitted by the counsel for the appellant that, the respondent is still living in the suit property to date as a tenant and it was wrong for the trial tribunal to order the appellant to refund the respondent 3,000,000/=Tshs. That, the trial tribunal was required to award the appellant an mount prayed as arrears of rent, about 5,700,0000/=Tshs.

Lastly on the 4th ground, it was argued that the rule is clear that the costs always follow the event as provided for under section 30(1) & (2) of the Civil Procedure Code, Cap 33 R.E 2019. Though the same are on the discretion of the court but such discretion is to be exercised judiciously. If the costs are not given, the court has to state the reasons why it did not award them as stated in number of decisions including the case of

Mohamed Salimin versus Jumanne Omary Mpesa, Civil Application No. 4 of 2014, Court of Appeal of Tanzania, where it was held that that;-

> *"As a general rule, costs are awarded at the discretion of the court but the discretion is judicial and has to be exercised upon established principles, and not arbitrarily or capriciously."*

In reply Advocate Patricia maintained on the 1st, 2nd and 3rd grounds that, the appellant consented to the refund of the purchased money and the same was deposited in his personal account at the National Microfinance Bank. The respondent deposited the amount equal to the purchase money. That, the chairperson made the refund order because he was satisfied that the appellant was given back his purchase money and not the rent as he claims. If the said money was deposited for rent, the respondent could have signed the lease agreement. After all the trial tribunal made a correct finding that there was no lease agreement between the parties, rather the appellant was refunded his money and the respondent took back the suit property as agreed.

She went on to argue on the 4th ground that awarding costs of the case is in the discretion of the court, even the cases used by the appellant to argue on this ground provide so. Above all, both parties contributed to the existence of the dispute, the appellant himself being the main contributor to the dispute by accepting a proposal to rescind agreement already executed on the sale of the suit house. Above all both incurred costs in prosecuting and defending the said case, hence the appellant

cannot benefit from his own wrongs, his conducts fall within the *volenti non fit injuria* principle. It was just and equitable for both parties each to bear his costs.

In his brief rejoinder, the applicant's counsel reiterated his submissions in chief.

I have given the submissions of both counsels for parties in this appeal a consideration they deserve. The issue worth of my attention is whether the appeal has merit or not. I will consolidating the 1st to 3rd grounds of appeal and discuss them together. To answer these three grounds, I will heavily rely on the Law of Evidence Act, Cap 6 R.E 2019 on sections 110 (1) & (2), 111, 112, 115 and 118. For quick reference I will reproduce them as follows:-

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> 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.*
>
> *111. The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side.*
>
> *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.*

115. In civil proceedings when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

118. When the question is whether persons are partners, landlord and tenant, or principal and agent and it has been shown that they have been acting as such, the burden of proving that they do not stand or have ceased to stand, to each other in those relationships respectively, is on the person who asserts it."

The appellant's counsel has insisted in his arguments that, between the appellant and the respondent, there existed a lease agreement that came right after the appellant purchased the suit house. That he allowed the respondent to occupy the suit house as a tenant for the rent and period they agreed as per their agreement. This being his assertion and most importantly he was the applicant at the trial tribunal, he had a duty to prove to the satisfaction of the tribunal that his claims are true. The burden of proof was on him. He was the one standing a chance of losing the case in case the respondent chose to remain silent as per section 110 (1) & (2) and 111 of the Evidence Act, (supra).

Moreover, the fact that he was the one having knowledge of the existence of the said lease agreement between him, and the respondent added burden of proof on him to show the same really existed, see sections 112, 115 and 118 of the Evidence Act, (supra). However, looking on the evidence on record, what the appellant managed to prove is the purchase of the suit house from the respondent. Both parties admitted to that fact, though the respondent came to change his mind later following a pressure

from his family, but that was too late as the transaction had already been completed. It is also an undisputed fact that the respondent deposited into the appellant account a total of 3 million shillings, to him it was a refund of the purchase price given to him by the appellant. But according to the appellant, this was a rent following the tenancy agreement between the two. In whatever aspect, since the appellant failed to prove the existence of the lease between him and the respondent, what remains to be true is the respondent's claim that the money gave to the appellant was a refund of his purchase price, following a cancellation of the sale of the suit house. Under the balance of probability rule, in my opinion, the respondent's story is more likely to be true than that of the appellant as far as their relationship on the suit house is concerned. This is because from when the sale took place in 2006 to 2012 more than 4 years had elapsed to be settled with 3m as rent covering 4 years as claimed by the appellant. And at this juncture, I prefer to rely on the illustration on how the balance of probability rule works as given by **Lord Hoffman** in **RE B (CHILDREN) (2008) 35** that:-

> *"if a legal rule requires a fact to be proved (a fact in issue), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either it happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that, one party or the other carries the burden of proof. If the party bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not happened. If he does discharge it, the value of 1 is returned and the fact is treated as having happened."*

On the basis of the above quoted jurisprudence by **Lord Hoffman** as far as the balance of probability rule is concerned, I am of the settled view that the trial tribunal made a correct finding that the appellant is a lawful owner of the suit land. However, to regain possession of the same, he has to refund the respondent the 3,000,000 Tshs he was given by him as a return of the purchase money after the respondent's family resisted to the sale of the suit property. That being said, the 1st to 3rd grounds of appeal are baseless and the same are accordingly rejected.

On the 4th ground, I have to agree with Advocate Patricia for the respondent that, the appellant himself contributed in the dispute by agreeing to be refunded his purchase money and again changing his mind desiring retaining the property after a long time had elapsed. He then let the respondent continue to occupy the suit property for several years undisturbed thereby creating a legitimate expectation to him that the said property is his, until when the appellant appeared demanding for the respondent to vacate the house. In that case, it was correct for both parties to have their own costs in the suit before the trial tribunal as both incurred costs in one way or the other in the fight to get ownership of the suit property. The 4th ground too is dismissed.

In the event, I find the entire appeal to have no merit and it is hereby dismissed with costs.

THE HIGH COURT OF TANZANIA
LAND DIVISION

M.P. OPIYO,

JUDGE

13/12/2021