IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 240 OF 2021

(*Originating from the decision of the District Land and Housing Tribunal for Kinondoni at Mwananyamala in Land Application No. 585 of 2016)*

AHMED HAJI ..... APPELLANT

VERSUS

CORNELIUS K. KARIWA ..... RESPONDENT

Date of last Order: 01/07/2022

Date of Judgment: 24/08/2022

JUDGMENT.

I. ARUFANI, J

The appellant filed the instant appeal in this court to challenge the decision of the District Land and Housing Tribunal for Kinondoni District at Mwananyamala (hereinafter referred as the tribunal) delivered in Land Application No. 585 of 2016. The background of the matter is to the effect that the respondent filed an application before the tribunal against the appellant claiming for payment of Tshs. 7,200,000/ being rent arrears, Tshs. 16,000,000/= being costs of renovating the suit premises, order of evicting the appellant from the suit premises, interest of 7% per month on the decretal amount and costs of the application.

After hearing the evidence from the parties, the tribunal decided the matter in favour of the respondent and ordered the appellant to pay the respondent Tshs. 15,000,000/= being unpaid rent, Tshs 8,000,000/= being half of the costs sought by the respondent for renovating the suit premises and costs of the application. The appellant was aggrieved by the decision of the tribunal and filed in this court a memorandum of appeal carrying the grounds of appeal listed hereunder: -

1. *That the learned trial Chairman miserably erred in law and fact for failure to evaluate properly the evidence and failed to decide in the respondent's favour besides the cogent evidence on record that outweighed that of the respondent.*
2. *That the learned trial Chairman erred in law and fact for rewarding the respondent Tshs. 15,000,000/= purported to be rent arrears the amount which was never pleaded by the respondent and the said rent arrears where not specifically proved.*
3. *That the learned trial Chairman erred in law and fact for condemning the appellant to breach the purported tenancy agreement terms which were neither reduced in writings nor proved as required by law.*
4. *That the learned trial Chairman erred in law and fact for condemning the appellant to pay the respondent Tshs. 8,000,000/= being the purported damage of demised premises without proof to the required standard of the alleged damage.*

5. That the learned trial Chairman erred in law and fact composing a judgment which lacks essential elements of the proper judgment the same lacks reasons for the decision.

While the appellant was represented in the appeal by Mr. Claus Thomas Mwainoma, learned advocate, the respondent was represented by Ms. Glory Venance, learned advocate. The counsel for the parties were ordered to argue the appeal by way of written submissions and I commend them for filing their written submissions in the court within the time given by the court.

The counsel for the appellant argued in relation to the first ground of appeal that, the claims of the respondent were mainly rent arrears and compensation which both are special damages which needs to be not only pleaded but also strictly proved. He argued the stated claims can be seeing at the first page of the judgment of the tribunal where is stated the reliefs claimed by the respondent were Tshs. 7,200,000/= and Tshs. 16,000,000/=. He argued that, to the contrary the respondent (PW1) stated in his evidence the rent arrear was Tshs. 15,000,000/= without any evidence to prove the same.

He argued that, while the respondent stated in his testimony the monthly rent was Tshs. 450,000/= the appellant (DW1) contested the said rent and stated the monthly rent was Tshs. 300,000/= per month.

He argued that, the rent arrears were Tshs. 3,600,000/= and the appellant paid Tshs. 3,000,000/= out of the stated Tshs. 3,600,000/= and left a balance of Tshs. 600,000/= which he promised to pay the same if the case would have been withdrawn from the court. He submitted that, there is no evidence which either proved the claims nor contract setting out monthly rent as well as lease terms and conditions for the alleged tenancy relationship. He submitted further that there is no witness was called to prove the respondent's claims which was strongly contested by the appellant.

He referred the court to the decisions of the Court of Appeal of Tanzania made in the cases of **Africarriers Limited V. Millenium Logistic Limited**, Civil Appeal No. 185 of 185, **Engen Petroleum (T) Ltd V. Tanganyika investment Oil and Transport Ltd**, Civil Appeal No. 103 of 2003 and **Anthony Ngoo & Another V. Kitinda Kimaro**, Civil Appeal No. 25 of 2014, (All unreported) where the standard and requirement to prove claims of damages were well articulated. He stated that, in proving special damages, documentary evidence must be produced to prove the alleged loss but the Chairman failed to evaluate the evidence and awarded unproved special damages.

He argued in relation to the second ground of appeal that, there was uncertainty on monthly rent, and period of rental arrears. He argued that,

while the respondent stated monthly rent was Tshs. 450,000/=, the appellant stated the rent payable per month was Tshs. 300,000/=. He argued that, while the stated issue was left unproved the Chairman erroneously awarded the respondent Tshs. 15,000,000/= as special damages arising from rent arrears. He stated the respondent had only one exhibit which was an acknowledgement receipt admitted in the case as exhibit P2 which the appellant refused to have received the same. He stated that, the Chairman was required to act on the appellant's admission that the amount of rent payable per month was Tshs. 300,000/= and the appellant was only indebted for the year 2016.

As for the third ground of appeal the counsel for the appellant argued that, it was undisputed fact that the respondent entered into an oral lease agreement with the appellant though the parties were not in consensus about the agreed terms. He argued that, Part IX of the Land Act Cap 113 R.E 2019 provides for terms which are implied in all lease agreement. He referred the court to section 88 (1) of the Land Act which bound the land lord to keep the dwelling house fit for human habitation at the beginning of the tenancy and during the lease. He also referred the court to section 88 (2) of the Land Act which empowers the land lord to enter and inspect and repair the defects which are under his obligation.

He argued that, the suit premises was built about 25 years ago from the time of hearing of the suit at the tribunal. He submitted that, during all that period the respondent has never taken any substantial repair on the suit premises. He stated it was wrong for the chairman to hold the respondent was accountable to fix the damages of the dwelling house alleged by the respondent which resulted from reasonable wear and tear. He referred the court to section 89 (1) (c) of the Land Act which states the lessee is not bound to repair damage or restore the land to the same conditions they were at the beginning of the lease where the damage or deterioration of the conditions is caused by reasonable wear and tear.

As for the fourth ground the counsel for the appellant argued that, as testified by DW2 who was an expert, the suit premises was not built on required standard taking into account the topographical location and soil of the place where the suit premises is built. He said the mentioned witness said the house was too old, hence the damage was not a result of appellant's act but still the chairman went on comparing the expert evidence with the photos taken from the suit premises. He argued that, Tshs. 8,000,000/= ordered to be paid to the respondent as a special damage was not specifically and strictly proved but the chairman based on assumptions and photos which did not prove the awarded damage.

He also challenged the procedure and manner of conducting the visit of locus in quo done by the chairman by arguing the same did not adhere to the required procedure. He referred the court to the case of **Prof. T. Maliyamkono V. Wilhelm Sirivester Erio,** Civil Appeal No. 93 of 2021 (unreported) where the procedures and manner of visiting a locus in quo was stated. He argued that the chairman did not record what took place at the locus in quo and was evaluated in the judgment. He submitted that may be interpreted that the chairman concealed some of the vital evidence obtained from the visit done on the locus in quo.

Coming to the fifth ground of appeal the counsel for appellant argued that, Order XX Rule 4 of the Civil Procedure Code, Cap 33 R.E 2019 provides for essential matters to be taken into account when composing a judgment. He submitted that the chairman of the tribunal did not state the reason for awarding Tshs. 15,000,000/= which was baseless unproved arrears. He submitted further that, as the specific damages awarded were not quantified and strictly proved they are praying the appeal be granted.

In response the counsel for the respondent argued in relation to the first ground of appeal that, the amount of Tshs. 7,200,000/= was a remaining outstanding arrears as on 16th November, 2016 when the matter was filed before the tribunal. She argued that, whereas Tshs.

1,800,000/= was outstanding rent arrears for the year 2015, Tshs. 5,400,000/= was rent arrears for the year 2016. She argued that, the matter was heard at the tribunal on 11th November, 2018 which is two years after the institution of the matter at the tribunal.

She went on arguing that, as the appellant continued to live or use the suit premises without paying any rent which was Tshs. 450,000/= per month that caused an accumulation of total rent of Tshs. 10,800,000/= for the year 2017 and 2018 when the matter was pending in the tribunal. The counsel for the respondent referred the court to the case of **Makori Wassaga V. Joshua Mwaikambo & Another,** [1987] TLR 88 where it was stated parties are bound by their own pleadings.

She stated that, in the application form the respondent averred at paragraph 5 that the rent payable by month was Tshs. 450,000/= and in paragraph 2 of the appellant's written statement of defence, the appellant took note of the contents of the said paragraph. She argued that implies the appellant did not dispute the quantum of rent payable per month that had been expressly stated it was Tshs. 450,000/=. She submitted that the appellant is estopped to deny the same at this time and claim that the rent payable is Tshs. 300,000/=.

As for the award of Tshs. 8,000,000/= which was challenged by the counsel for the appellant the counsel for the respondent argued that, the

evidence led by the respondent who also tendered exhibit P1 being photographs of the suit premises established the respondent stored in the suit premises which was for residential purpose heavy items like trucks tyres, plastic containers filled with motor oil, heavy gearboxes and parts of engines. She argued that, the said items contributed to the misuse and eventually damage of the suit premises that prompted the tribunal's chairman to award Tshs. 8,000,000/=.

She stated that, the said award was made after the tribunal visited the suit premises on 19th April, 2021. She argued that, the report given by DW2 who was an expert was found it was imbalance in favour of the appellant. She distinguished the case of **Engine Petroleum (T) Ltd** (supra) by stating the quantum of rent payable by the appellant was noted and was not disputed. She equally distinguished the case of **Africarriers Limited** (supra) on the ground that the principle laid in the said case is not applicable in the present case.

She argued in relation to the second ground of appeal that, the matter subject of this appeal was instituted in the court way back in 2016 and hearing of the evidence commenced on 12th November, 2018 which is two years after institution of the matter in the tribunal. She stated that, after institution of the suit in the court the appellant continued to default paying the rent and caused him to be in arrears of rent for the period of

2016, 2017, 2018 and 2019. She said the stated evidence was not disputed.

She argued further that the total rent for the stated period of time was Tshs. 18,000,000/= and as the appellant said to have paid Tshs. 3,000,000/= the balance of unpaid rent arrears was Tshs. 15,000,000/= ordered by the tribunal to be paid to the respondent by the appellant. She submitted that, if the rent arrears would have not been summed up for the whole period the respondent would have been barred by the principle of res judicata provided under section 9 of the Civil Procedure Code to claim for the balance of unpaid rent. She submitted further that, there is nothing inappropriate for the tribunal chairman to grant the respondent the sum of Tshs. 15,000,000/= which constitutes rent arrears pleaded in the application and two years rent while the matter was subsisting in the tribunal pending hearing and its determination.

The counsel for the respondent stated in relation to the third ground of appeal that, there is no dispute that the parties entered into an oral tenancy relationship and the same was breached after none payment of the rent for long time. She stated that, the record of the tribunal shows when the appellant was cross examined, he conceded he was indebted for the year 2016, 2017, 2018 and 2019. As for the rent payable she argued the appellant noted paragraphs 3, 4, and 5 of the application

which states the rent per month was Tshs. 450,000/=. She added that, this is a fit case where the principle that parties are bound by their pleadings should be applied.

It was contended by the counsel for the respondent that, the evidence of the respondent did not state the appellant was bound to undertake major repair of the suit house. To the contrary the respondent stated the appellant had changed the use of the suit premises from residential purposes to a warehouse where he was storing heavy items which caused damages to the suit property. She added that, exhibit P1 shows damage which cannot be brushed off as simply reasonable wear and tear stated by DW2. She stated that, when the appellant was cross examined, he stated he is doing transportation business something which connects with the items found in the house as per exhibit P1. She submitted that, what was awarded to atone for the damage caused to the suit premises was appropriate for the damages caused by the appellant.

With regards to the fourth ground of appeal the counsel for the respondent argued that, as what the appellant submitted in relation to this ground is similar to what he submitted in his first ground of appeal she is reiterating what she has submitted in reply to the first ground of appeal concerning the award of Tshs. 8,000,000/=. She added that, the tribunal awarded the stated sum of money instead of Tshs. 16,000,000/=

after finding the damage was not 100% caused by wear and tear of the house due to its long-life span but also the appellant contributed by his misuse by storing therein heavy and hard objects as depicted in exhibit P1.

She further argued that, the appellant seeks to fault the manner in which the locus in quo was visited while that was not raised as a ground of appeal. She stated the argument is totally misplaced and has no any connection with the fourth ground of appeal and prayed the said argument together with the case of **Prof. T. Maliyamkono** (supra) be expunged from the record for having no ground to stand on. She argued further that, the appellant attended the visit of locus in quo but he didn't say how he was prejudice by the visit of the locus in quo. She stated the judgment of the tribunal shows that, grant of Tshs. 8,000,000/=, justice was met.

As for the last ground of appeal the counsel for the respondent argued the stated ground has no merit. She argued that, the judgment of the tribunal gave reason for the decision as depicted at pages 8, 9 and 10 of the judgment that the appellant was in breach of tenancy agreement as he did not dispute that he was living in the suit premises and damages were found in the house in dispute. She submitted that, the basis of granting Tshs. 15,000,000/= was stated in the judgment of the tribunal

to be the accrued defaulted payment of rent and the grant of Tshs. 8,000,000/= was due to the damage occasioned by misuse of the suit premises. At the end she prayed the appeal be dismissed with costs.

In rejoinder the counsel for the appellant reiterated what he stated in his submission in chief. He however added that, the fact that the appellant noted paragraph 3, 4 and 5 of the application the same does not absolve the respondent from proving his claim at the hearing stage of the case. He stated that, although the counsel for the respondent contended the site visit on 19th April, 2021 was the basis of the award of Tshs. 8,000,000/= but there is no record on proceedings or judgment commenting anything about the site visit. He reiterated his submission that, the matter was not proved at the tribunal to the laid down guidelines and requirements. Finally, he prayed the appeal be allowed.

The court has carefully considered the rival submissions filed in this court by the counsel for the parties and after going through the grounds of appeal filed in this court by the appellant and the record of the matter it has found most of the grounds of appeal are so much interrelated in such a way that they cannot be entertained separately. Therefore, in order to avoid unnecessary repetition of arguments which are overlapping, the court will determine this appeal by dealing with all grounds of appeal

together but by following closely the arguments advanced in the submissions of the counsel for the parties.

Starting with the contention raised in the first ground of appeal the court has found the appellant and his advocate argued the tribunal failed to evaluate the evidence adduced at the tribunal and failed to decide the matter in favour of the appellant despite the fact that the appellant's evidence on record outweighed that of the respondent. To the view of this court this ground invites this court to re-evaluate the evidence adduced at the tribunal for the purpose of determine whether the evidence adduced before the tribunal was properly evaluated by the tribunal.

The court has found as this is a first appeal then as stated in the case of **Pandya V. R,** [1957] EA 336 cited in the case of **Hosea Katampa V. the Ministry of Energy and Minerals & Two Others,** Civil Appeal No. 221 of 2017, CAT at Mwanza (unreported) the court has a duty to reconsider and re-evaluate the evidence adduced at the trial tribunal and come to its own conclusion while bearing in mind that it never saw the witnesses testifying in the matter.

While being guided by the position of the law stated in the above cited cases the court has found as stated in the judgment of the tribunal it is not in dispute that there was an oral tenancy agreement between the

appellant and the respondent whereby the appellant was occupying the house of the respondent on payment of rent. It is also not in dispute that, the appellant defaulted to pay the required rent and that prompted the appellant to institute the matter which is the genesis of this appeal at the tribunal.

The dispute is how much rent the appellant was supposed to pay to the respondent and whether the appellant caused damages to the suit property claimed and awarded to the respondent by the tribunal and whether the appellant was bound to pay the awarded compensation. The court has found those are the issues the court is required to determine in this appeal. Starting with issue of rent payable per month the court has found that, while the respondent said the rent payable per month was Tshs. 450,000/=, the appellant said the rent payable per month was Tshs. 300,000/=. The court has found that, as stated earlier in this judgment the tenancy agreement between the parties was oral and not written therefore the court is supposed to see which evidence was adduced to establish which rent was payable per month.

The court has found that, as rightly argued by the counsel for the appellant the claim of rent arrears and compensation are specific damages. As stated in the case of **Anthony Ngoo & Another** (supra) the said claims were required to be specifically pleaded and strictly

proved. The court is also in agreement with the counsel for the appellant that, as stated in the case of **Africarries Limited** (supra) it is a requirement of the law that in civil litigation the burden of proof is on balance of probability and it lies with a party who alleges. That being the position of the law the issue to determine here is whether the rent arrears awarded to the respondent was proved to the standard required by the law.

The court has considered the argument by the counsel for the appellant in proving special damages, documentary evidence must be adduced to prove the alleged loss but failed to see any law supporting that argument. The court has arrived to the above stated finding after seeing section 61 of the Evidence Act, Cap 6 R.E 2019 states categorically that, all facts, except the contents of documents, may be proved by oral evidence. In the light of the wording of the afore referred provision of the law and by taking into consideration that the parties are not at dispute that their tenancy agreement was oral and not written it cannot be said the terms and conditions of the tenancy agreement which includes payment of rent must be proved by documentary evidence while there is no document prepared for the stated tenancy agreement.

Coming to the issue of which rent was payable between the one stated by the appellant and the one stated by the respondent the court

has found determination of that issue was mostly determined basing on credibility of evidence adduced before the tribunal by the parties. The court has come to the stated view after seeing there was no documentary evidence made by the parties to prove what rent was supposed to be paid per month.

Since the respondent stated in his evidence the rent payable per month was Tshs. 450,000/= and the appellant said it was Tshs. 300,000/= and the tribunal's chairman believed the evidence of the respondent, then the court has found it cannot lightly fault the said finding which seems to be based on credibility of witnesses testified before the tribunal. The court has arrived to the above finding after seeing the Court of Appeal stated in the case of **Ali Abdallah Rajab V. Saada Abdallah Rajab & Others,** [1994] TLR 132 that: -

> *"Where a case is essentially one of facts, in the absence of any indication that the trial court failed to take some material point or circumstances into account, it is improper for the appellate court to say that the trial court has come to an erroneous conclusion."*

The court has tried to see whether there is some material point or circumstances which was not taken into account in the appellant's case but failed to see anyone. The court has come to the stated view after seeing that, as rightly argued by the counsel for the respondent, although

it is true that the respondent did not call any witness to support his evidence but the issue of rent payable per month to be Tshs. 450,000/= was averred at paragraph 5 of the form of the application filed in the tribunal by the respondent. The court has found the stated rent was not disputed by the appellant in his written statement of defence as he just noted the same.

The court has also found the respondent continued to state in his evidence he gave before the tribunal that the rent payable per month was Tshs. 450,000/= and it was being payable annually. The said evidence of the respondent is being supported by exhibit P2 which shows the rent paid by the appellant on 12th December, 2014 was Tshs. 3,600,000/= and leaving a balance of Tshs. 1,800,000/=. The total of the said amount is Tshs. 5,400,000/= which when divided by twelve months of a year it gave the rent payable per month was Tshs. 450,000/=. On the other hand, the court has failed to see any evidence supporting the evidence of the appellant that the rent payable per month was Tshs. 300,000/= and not Tshs. 450,000/= stated by the respondent. That makes the court to fail to see any error committed by the tribunal's chairman in evaluating the evidence adduced at the tribunal in relation to the amount of rent which was supposed to be paid per month.

If the rent payable per month was Tshs 450,000/= the court has found that, as it was stated by the counsel for the respondent the appellant, was in arrears of rent for the period of 2016, 2017, 2018 and 2019 which in its total was Tshs 18,000,000. The court has found that as the counsel for the respondent stated the appellant paid Tshs 3,000,000/= out of the due rent the court has found the tribunal's chairman did not error in award the respondent the sum of Tshs 15,000,000/= being rent arrears for the stated period of time.

Coming to the claim relating to compensation for damages alleged was caused to the suit premises which the respondent was claiming for Tshs. 16,000,000/= and he was awarded Tshs. 8,000,000/= the court has found the stated claim was specifically pleaded at paragraph 6 (v) of the application filed at the tribunal and proved by the evidence adduced by the respondent before the tribunal. The evidence of the respondent was supported by exhibit P1 which were photographs taken from the suit property. Those photographs shows the items placed in the suit property by the appellant and stated were the cause of the damages alleged was caused to the suit property by the appellant.

The court has found that, although it is true as argued by the counsel for appellant that the appellant called an expert witness who testified as DW2 and tendered before the tribunal his report which was admitted in

the matter as exhibit D1 but the tribunal's chairman stated categorically in the judgment of the tribunal that the evidence of the said witness was found it was not credible. The court has found the position of the law in relation to the use of evidence of expert witness as stated in various cases one of them being the case of **Fauzia Jamal Mohamed V. Oceanic Bay Hotel**, Civil Appeal No. 161 of 2018, CAT at DSM (unreported) is that, expert evidence is simply an opinion and the court is not bound to accept it.

While refusing to accept the evidence of the said expert witness the tribunal's chairman stated that, when the said witness went to investigate the suit premises the items alleged had been kept in the suit property were not there that is why he failed to include them in his report. As the tribunal was not bound to accept the evidence given by DW2 who was an expert witness the court has failed to see anything material which can move it to fault finding of the tribunal's chairman in the way the evidence of DW2 was evaluated.

The court has also considered the issue of the duty of the respondent as land lord to maintain and repair the suit premises as provided under section 88 (1) (d) and (2) (a) read together with section 89 (1) (c) (i) of the Land Act. The court has found it is true that under the cited provisions of the law the respondent as a land lord had an implied duty to maintain

and repair the suit property for the whole period of the lease. However, the court has found the appellant as a lessee had also an implied duty under section 89 (1) (b) of the same law to use the leased property in a sustainable manner and in accordance with any condition imposed on that use of the leased property by the lease.

He is also required by section 89 (1) (h) of the same law to repair or make good any defect or breach of covenant for which the lessee is responsible. The only exception is that he will not be bound to repair the damages occurred to the leased property out of the control of the lessee like reasonable wear and tear or damages caused by natural disasters. As the appellant has not disputed the suit premises was for residential use and he used the same for other purposes which is alleged it caused damages to the suit premises, the court has found it cannot be said the appellant was not responsible for payment of the damages he caused to the suit property.

As for the issue of propriety of the procedure of taking evidence when the tribunal visited the locus in quo the court has found it is true as argued by the counsel for the respondent that the said issue was not raised in any of the grounds of appeal filed in this court by the appellant. The court finds that, although the counsel for the appellant tried to peg the said argument in the fourth ground of appeal but in actual fact the stated issue

is not fitting in the said ground of appeal as it was supposed to be raised in a very clear word to justify the same to be determined by the court.

The court has also been of the view that, even if for the sake of argument, it will be taken the said issue is supposed to be determined by the court and it will also be accepted in visiting the locus in quo the tribunal failed to observe the procedures laid in the case of **Prof. T. Maliyamkono** (supra) but that is not the only evidence relied upon by the tribunal's chairman to find the respondent was entitled to the damages he was awarded in the case. The court has arrived to the stated finding after seeing there was evidence of the respondent himself which was also supported by exhibits P1 and P2. In the premises the court has failed to see any merit in the stated argument.

As for the last ground of appeal where it is stated the judgment of the tribunal lacks essential elements of a proper judgment the court has found that, as argued by the counsel for the appellant the elements of a proper judgment are provided under order XX Rule 4 of the Civil Procedure Code which states as follows:

> *"A judgment shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for the decision."*

The court has found the counsel for the appellant is arguing the decision of the tribunal is lacking reasons for the amount of rent awarded to the respondent and the reasons or compensation of damages awarded to the respondent. The court has found the argument by the counsel for the appellant is not supported by the record of the matter because as rightly argued by the counsel for the respondent the reason for the said award are well stated at of pages 8, 9, and 10 of the decision of the tribunal. In the premises the court has found this ground is devoid of merit.

In the light of all what I have stated hereinabove the court has failed to see merit in all arguments presented before this court by the counsel for the appellant and in grounds of appeal filed in this court by the appellant. Consequently, the appeal is hereby dismissed in its entirety for being devoid of merit and the costs to follow the event. It is so ordered.

Dated at Dar es Salaam this 24th day of August, 2022

I. Arufani

JUDGE

24/08/2022

Court:

Judgment delivered today 24th day of August, 2022 in the presence of Mr. Keneth Siwila, advocate for the appellant and in the presence of Mr. Victor Kessy, advocate holding brief of Ms. Glory Venance, Advocate for the respondent. Right of appeal to the Court of Appeal is fully explained.

I Arufani

JUDGE

24/08/2022