

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 195 OF 2021

(Arising from the District Land and Housing Tribunal for Kinondoni at
Mwananyamala in Land Application No.222 of 2020)

WINDSOR DISTRIBUTORS LIMITED 1ST APPELLANT

JOHN LUPEMBE 2ND APPELLANT

VERSUS

INDIAN OCEAN HOTELS LIMITED RESPONDENT

JUDGMENT

Date of Last order: 29.09.2022

Date of Judgment: 21.10.2022

A.Z.MGEYEKWA, J

The instant appeal stems from the decision of the Land Application No.222 of 2020 of Kinondoni at Mwananyamala. The District Land and Housing Tribunal for Kinondoni decided the matter in favour of the respondent. The material background facts to the dispute are; that the

appellants lodged a case against the respondent at the District Land and Housing Tribunal for Kinondoni. The Windsor Distributor Co. Ltd and J. W. Ladwa (1997) Limited entered into a one-year lease agreement. The appellant alleged to have done repairs of sofa sets at the tune of Tshs. 1,350, 000.00 while J. W. Ladwa (1997) Limited did not renovate the suit premises. The appellants claimed that while the lease was valid J. W. Ladwa (1997) Limited issued a notice to the appellant claiming rent and wanted them to execute another lease agreement.

According to the pleadings, the Houses and Homes Limited nor Indian Ocean Hotels Limited were part of the Lease Agreement. The appellant lodged a case against the respondent claiming for the Tribunal to declare the 1st appellant lawful tenant, the intended termination is illegal, an order directing to whom the outstanding rent is to be paid by the 1st applicant, cost of the case, and any other reliefs.

The respondent on his side denied all the allegations and filed a Counter Claim among others the respondent prayed for the tribunal to declare the 2nd appellant an illegal tenant, trespasser and be evicted. They also urged the Tribunal to compel the appellants to pay the respondent all arrears of rent. The District Land and Housing Tribunal for Kinondoni determined the application and decided in favour of the respondent.

Undeterred, the appellants have come to this Court seeking to assail the decision of the District Land and Housing Tribunal on the following fourteen grounds of grievance:-

1. That, the Decree and Judgment by the Honourable Chairman are contrary to law, weight of evidence, and probabilities of the Case.
2. That, the Honourable Tribunal erred in dismissing with costs the Application of the Appellants for the relief among other things an order sought directing to whom the outstanding rent has to be paid by the Appellants.
3. That, the Honourable Tribunal had not appreciated the evidence of PW1 and PW2 in favor of the Appellants.
4. That, the Honourable Tribunal ought to have appreciated that the termination of the Lease Agreement between the 2nd Appellant and the Respondent by the third party, HOUSES AND HOMES LIMITED was illegal but only a collusive act to defeat the Lease Agreement in favor of the Appellants and further the Appellants had been always willing and able to pay covenanted rent to a proper party to the Lease Agreement.
5. That, the Honourable Tribunal erred in both law and facts in arriving at the finding that, the said HOUSES AND HOMES LIMITED is the owner

of the properties in the absence of conclusive ownership documents/exhibit tendered and admitted.

6. That, the Judgment and Decree of the Honourable Tribunal in dismissing and granting the Counter Claim was not based on the facts and the evidence on records.
7. That, the observation of the Honourable Tribunal on the valid and binding Lease Agreement the consideration was not paid as there was a dispute on who should be paid in the presence of privity of contract.
8. That, the Honourable Tribunal ought to have come up with findings that, Lease Agreement, Exhibit P1 was not stamped and therefore, ought to have not been admitted in evidence. Since the Lease Agreement, Exhibit P1 was not a shred of lawful evidence in the case, thus the Honourable Tribunal ought to have not considered in deciding the rights of the parties regarding the disputed property.
9. That, once the Lease Agreement ought to have been excluded as evidence, it follows that the Honourable Tribunal was in error in not finding that, there was no legal evidence to rely on in its final verdict against the Appellants.
10. That, the Honourable Tribunal was in gross error in not finding that J.W. LADWA (1977) LIMITED and HOUSES AND HOMES LIMITED were two distinctive body corporates.

11. That, the Honourable Tribunal grossly erred both in law and facts in finding that, the 2nd Respondent ought to have investigated the owner of the rented Apartment No. F 1, Kawe Beach, Dar es Salaam.
12. That, the Honourable Tribunal was in gross error in finding that, there was an Agency relationship between the Respondent herein and HOUSES & HOMES LIMITED who was purported to be the registered owner of the suit property.
13. That, Honourable Tribunal erred in law in disregarding the closing submissions by the Appellants.
14. That, the Honourable Tribunal erred in law in ordering forceful eviction which ought to be in a mode of execution during execution proceedings of the impugned decision and that, the awarded rental amount due is uncertain as not quantified in the Decree.

When the appeal was called for hearing on 12th July, 2022 before Hon. Arufani, J, this court issued an order to the parties to argue the appeal by way of written submissions whereas the appellant submitted the submission in chief on 26th July, 2022 and the respondent filed his reply on 9th August, 2022. The mater was scheduled for mention on 20th August, 2022. Pursuant thereto, a schedule for filing the submissions was

duly conformed to save for the appellant who waived his right to file a rejoinder. On 23rd September, 2022, the counsels were informed that the matter was transferred from Hon. Arufani, J to Hon. Mgeyekwa, J, because of a special session to expedite the hearing of backstopping cases. The counsels had no any objection.

Mr. Balomi, counsel for the appellants was the first one to kick the ball rolling. He opted to combine and argue the 2nd, 4th, and 8th grounds together. Equally, he combined the 3rd and 13th grounds. Except for the first ground, he argued it separately.

The counsel for the appellant began by tracing the genesis of the matter which I am not going to reproduce in this appeal. On the first ground, Mr. Balomi contended that the tribunal erred in law in arriving at its impugned decision without first pronouncing to the parties the written opinion of the gentlemen assessor as required under 4th Schedule of Code of Conduct for the Assessors, Regulations 34 (2) of the Land Disputes Courts (The District land and Housing Tribunal) Regulation, 2003. He argued that there were two written opinions of the assessors namely Mzee Kinyondo and Mama Kalunde which would have been delivered to the parties before the delivery of the impugned Judgment. He claimed that the decision is a

nullity for failure to comply with Regulation 19 (1) and (2). Regulation 19 (2) reads:-

" 19 (2) Notwithstanding sub-regulation (1) the Chairman shall before making judgment require every assessor present at the trial at the conclusion of the hearing to give his opinion in writing and the assessor may give his opinion in Kiswahili."

Arguing for the 2nd, 4th and 8th grounds, the learned counsel for the appellant contended that the tribunal ought to have appreciated that the termination of the Lease Agreement between the 2nd appellant and the respondent by the third party; House and Homes Limited was illegal. He contended that the Chairman on page 19 of the impugned decision among other things ordered the appellants to pay rent and outstanding rent to House and Homes Limited who is a mere stranger. He asserted that the order was issued without valid proof that the said Company was the owner of the suit property. The learned counsel referred this court to page 12 of the impugned decision. He spiritedly argued that a person who is not a party to a case cannot chip in anyway. He added that the order of the Tribunal was based on a Lease Agreement (Exh.P1) which was not between the appellants and House and Homes Limited.

The learned counsel for the appellant continued to submit that the position of payment of stamp duty on the document relied on was firmly confirmed by this Court in the case of **Josephat I . K Lugaimukamu v Fr. Kanute Mzuwaanda** (1986) TLR. He also referred this Court to Article 6 (1) to the Schedule of the Stamp Duty Act, 1972 which state that no unstamped document shall be admitted in evidence unless stamp duty is paid thereof.

The learned counsel for the appellant further submitted that the tribunal on the 3rd and 13th grounds did not appreciate the evidence of PW1 and PW2 in favour of the appellant. He added that the Chairman erred in not attaching weights or evidential value on the evidence tendered by the appellants ' witnesses paraded and the argument made in the closing submissions was not reflected in the final erroneous decision.

The learned counsel for the appellant went on to submit that the Chairman awarded the respondent based on the Counter Claim while the respondent is on records that he did not sufficiently discharge her duty as required in evidence. Fortifying his submission he cited section 110 (2) of the Evidence Act, Cap, 6. He stressed that the respondent and her witness never cleared the burden of proof on the ownership claimed as well as rental chargers by way of Counter Claim.

In conclusion, Mr. Balomi, counsel for the appellant urged this Court to interfere with the trial tribunal's decision since it arrived at a wrong holding, he beckoned upon this Court to quash, reverse and set aside the tribunal judgment with costs.

In reply, the learned counsel for the respondents started with an introduction party, which I am not going to reproduce in this appeal. The learned counsel for the respondent also opted to argue the appeal by combining the 2nd, 4th, and 8th grounds and argue them together. Equally, he combined the 3rd and 13th grounds together and argued the 1st ground separately.

On the first ground, the respondent's advocate was brief and straight to the point. The counsel submitted that the trial commenced with two assessors namely Kinyondo and Mama Mlunde. He added that at the time of defence case there were no assessors since their tenure came to an end. To support his argument he referred this court to page 8 of the impugned Judgment. The counsel went on to submit that the tribunal proceeded with hearing the case in accordance with section 23 (3) of the Land Disputes Courts Act, Cap. 216. He insisted that the Tribunal was right in finalizing the matter without pronouncing the opinion of the

assessors on the reason that their tenure of service lapsed, thus, it was his view that this ground lacks merit.

With respect to the 2nd, 4th and 8th grounds, the learned counsel for the respondent simply submitted that the grounds are centered on the issue of non-payment of stamp duty. The counsel stated that the appellant was required to ask the tribunal to assess the penalty and to pay. Expounding on the issue of admissibility of the document, the counsel contended that the document is inadmissible because it lacks stamp duty, he stated that the court can allow the party who produced the document to stamp the document and pay penalty fees. To support his submission he cited the case of **Sunderji Nanji Limited v Mohamed Kassam Bhaloo** [1958] 1 EA 762.

Arguing on the 3rd and 13th grounds, the counsel submitted that the grounds are centered on the issue of burden of proof. The counsel for the respondent submitted that it is settled law that he who wants the court to give a verdict in his favour on a certain right or liability depending on the existence of certain fact must prove that the same do exist. He added that the burden to prove lies on the person who alleges. To buttress his contention he cited section 110 (1) of the Evidence Act, Cap. 6. The learned counsel for the respondent continued to argue that the appellant

failed to prove his allegations because at the trial he stated that there was an existence of Lease Agreement between the appellant and J. W Ladwa (1997) Limited and on the breach of contract he mentioned the Company of House and Homes Limited. He added that all appellant's witnesses stated that the property in dispute is legally owned by Houses and Homes Limited thus, in his view it was the respondent who was responsible to collect rents as per (Exh.D1). He added that the Tribunal in construing his Judgment is required to assess the weight, credibility, and genuineness of the evidence given not otherwise. It was his submission that the tribunal performed its duty well.

In conclusion, the respondent submitted that the appeal lacks merit, and he urged this court to dismiss the appeal entirely.

So much for the submissions of the learned counsel for both parties. The ball is now in my Court. I now turn to the gist of the appeal, the issue which is the bone of contention hinges on the question *whether the appellant had good reasons to warrant this court to allow his appeal.*

The appellant in his written submission did not submit on the 5th, 6th, and 7th grounds. Therefore, I will follow the style of the submission made by both counsels. In my determination, I will consolidate the 2nd, 4th, and 8th grounds together because they are intertwined. Equally related are the

3rd and 13th grounds which I shall also determine together. Except for the first, ground which will be argued separately as they appear.

In addressing the first ground of appeal, whether the Chairman considered the assessors' opinions in his final verdict. I had to peruse the tribunal proceedings to find out what transpired during the hearing of the case. The Court of Appeal of Tanzania and the High Court of Tanzania have held in numerous authorities that the Chairman in his final verdict must consider the assessors' opinions, In the case of **Tubone Mwambeta v Mbeya City Council**, Civil Appeal No 287 of 2017 (unreported), the Court of Appeal of Tanzania stated that:-

*"In view of the settled position of the law, where the trial has been conducted with the aid of the assessors,...they must actively and effectively participate in the proceedings so as to make meaningfully their role of giving their opinion before the judgment is composed...since regulation 19 (2) of the Regulations requires every assessor present at the trial at the conclusion of the hearing to give his opinion in writing, **such opinion must be availed in the presence of the parties so as to enable them to know the nature of the opinion and whether or not such opinion has been considered by the Chairman in the final verdict.**"*

Reading the matter at hand, the proceedings date 28th April, 2021 show that the Chairman informed the parties that the assessors' tenure had expired and the parties were explained if they were ready to proceed with the hearing in the absences of the assessors. Mr. Balomi, counsel was not ready to proceed and Mr. Elly, counsel was ready to proceed in their absence. The Chairman ordered the matter to proceed with a hearing in absence of the assessors as per section 23 (1) of the Land Disputes Courts Act. Therefore, the Chairman was right to proceed with composing his Judgment, considering the fact that on page 8 of his Judgment he made it clear that the hearing proceeded without assessors because one assessor fall sick and the tenure of other assessors ended. Therefore, this ground is demerit.

On the second, fourth, and eighth grounds of appeal before embarking to determine the grounds of appeal, I would like to address the issue of stamp duty that, the trial Chairman entered into error by not affording the appellant a chance to pay for stamp duty if she could have done so then exhibit P1 might form part of the evidence on record. Guided by the case of **Josephat L.K Lugaimukamu v Father Canute J. Mzuwanda** (1985) TZHC 9, 1986 TLR 69 that as long as the document was already been admitted in court as an exhibit, therefore, the court can allow the appellant

to pay the requisite stamp duty and file a proper document before 21st October, 2022. However, the appellant did not comply with the court order. Therefore, this Court cannot analyse and consider the Tenancy Agreement that was made on 4th May, 2019 (Exh.P1) as a valid document in the eyes of the law. Thus, I differ from the findings of the tribunal that the said contract was a valid contract because the same was not stamped. This was the only document to prove whether J.W. Ladwa (1977) LTD entered into an agreement with Windsor Distributors Ltd Company in exclusion of Homes Ltd.

I have scrutinized the evidence on record and noted that the claim that House and Homes Ltd was appointed as a principal-agent to collect rents from Windsor Distributors Ltd Company is not supported by any cogent documentary evidence. I am saying so because the letter dated (Exh.D1) is not addressed to Windsor Distributors Ltd. Therefore the same cannot be relied upon to order the appellant to pay rent to House and Homes Ltd.

There is another letter dated 6th May, 2020 (Exh.P4), the same refers to a Lease Agreement between Windsor Distributor Co. Ltd and Houses and Homes Ltd, however, the said Agreement was not tendered at the tribunal to prove that the two parties entered into a legal agreement to create a legal relationship.

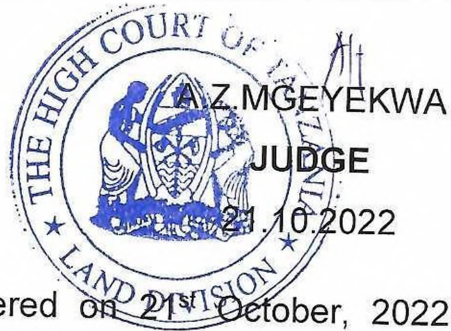
From the aforesaid findings, I hold that neither of the parties tendered a shred of documentary evidence to prove that they had a legal agreement that binds both parties. However, the only evidence on record is oral evidence that the Windsor Distributors Ltd Company had an agreement with J .W. Ladwa (1977) LTD whereas Windsor Distributors Ltd Company is required to pay rent to J. W Ladwe (1977) LTD. I also have considered the fact that the appellants do not dispute that they are tenants and are in indebt. Consequently, the appellant is required to pay the outstanding rent to J.W. Ladwa (1977) LTD.

Under the circumstances, I find the appellant's contention in the second and court grounds meritorious. I will therefore detain myself in evaluating and analyzing the remaining grounds of appeal.

For the aforesaid findings, I find that the appeal has merit. Therefore, I quash and set aside the Judgment, Decree, and proceedings of the District Land and Housing Tribunal in Land Application No. 222 of 2020 and orders that arise thereto. The appeal is allowed to the extent explained above. No order as to costs.

Order accordingly.

Dated at Dar es Salaam this date 21st October, 2022.



Judgment delivered on 21st October, 2022 via audio teleconference
whereas Mr.....



Right of Appeal fully explained.