IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 03 OF 2021

(Arising from the decision of the Kinondoni District Land and Housing Tribunal at Mwananyamala, in Land Application No. 451 of 2020)

COCODACOR GENERAL CO. LIMITED ..... APPELLANT

VERSUS

UNYIHA ASOCIATES CO. LIMITED ..... 1ST RESPONDENT

CHARLES MPAMBA CHENZA ..... 2ND RESPONDENT

JUDGMENT

29/3/2022 &19/04/2022

A. MSAFIRI, J

In the District Land and Housing Tribunal for Kinondoni at Mwananyamala (the trial Tribunal), the appellant, then as applicant sued the respondents claiming for declaratory order that; the applicant has paid rent for six years plus per the lease agreement, through the 2nd respondent, and that there is no claims for rent maintainable against her by the 1st respondent; a declaratory order that the 1st respondent's rental claims are baseless and dismissive; a declaratory order that the 1st respondent's acts of threatening to evict the applicant from the leased premises are unlawful and unenforceable and that if the 1st respondent wishes to terminate the lease agreement, must compensate the applicant for the costs incurred in the renovation of the leased premises; an order for permanent injunction to the 1st and 2nd respondents and their agents from trespassing into the leased premises and; general damages. After trial, the trial Tribunal

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decided the matter in favour of the respondents. Aggrieved, the appellant has filed this appeal basing on the six grounds of appeal as follows;

1. *That, the Hon. Chairperson of the Kinondoni District Land and Housing Tribunal erred in law and in fact by relying on the weak evidence adduced by the respondents without considering the strong and credible evidence adduced by the applicant.*
2. *That, the Hon. Chairperson erred in law and in fact by neglecting* ***S.24 of the Land Disputes Courts Act (CAP. 216 R.E 2019)*** *by differing with the assessors opinion without giving reasons for such differing the Assessors opinion.(sic).*
3. *That, the Hon. Chairperson erred in law and fact by holding that the Applicant had never paid the rent while there was some payments made by the Applicant and was not disputed by both parties.*
4. *That, the Hon. Chairperson erred in law and fact by dismissing the applicant application without consider (sic) that the Respondent unlawfully breached contract.*
5. *That the Hon. Chairperson erred in law and in fact by upholding the counter claim without consider (sic) that the Respondent is the one who breached contract.*
6. *That, the Chairperson erred in law and in fact by denying to adopt the construction cost of property in dispute from the Applicant on the ground that it had no signature and stamp while adopting the construction cost adduced by the Respondent without having signature and stamp of the writer.*

The appeal was heard by way of written submissions. The appellant's submissions in chief and rejoinder were drawn and filed by Mr. Hassan Alle.

Chande Hame, the appellant's advocate while the respondent's joint submission in opposing the appeal was drawn and filed by Mr. Godfrey Alfred; advocate of the respondents.

The submissions by the parties are part of the Court records and I am grateful for their efforts and energy in arguing this appeal which have been of great assistance to this Court. The submissions have been considered in my determination of this appeal.

Before I embark on deliberation of the appeal, I will briefly narrate the background of this matter. As per the appellant's side of the story, the appellant through her managing director entered into a lease agreement with the 2nd respondent as director of the 1st respondent to establish a recreational business. That in October, 2017 the appellant made renovations on the business premises located at Bunju, Dar es Salaam and owned by the respondents. The appellant claims that she has incurred expenses for renovation of the said business premises. That, in May 2018, the appellant and the 1st respondent entered a lease agreement (or sometimes referred as lease contract) for six years commencing on May, 2018 to May 2024 at a monthly rate of TZS. 500,000/-. That, the appellant paid all the rental charges for six years with a surplus of six months and the said payment was made to the 2nd respondent as director of the 1st respondent.

That, surprisingly, on 04th September 2020, the respondents served the appellant with the 14 days' notice to vacate the leased premises contrary to the agreement. After being issued with subsequent notice on 08th

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September, 2020 as a demand for payment of the accrued rents and another notice dated 09th October, 2020, demanding the appellant to vacate the suit premises within five days, the appellant decided to institute a suit against the respondents.

I will determine the merit of this appeal by analysis of the grounds of appeal advanced by the appellant. Having gone through the grounds of appeal, I am of the view that grounds No. 1,3,4 and 5 are related so I will determine them jointly. The said grounds of appeal are about the evidence which was adduced during the trial before the District Tribunal. The appellant claims that the trial Chairperson erred by holding that the applicant had never paid a rent while there was some payments made by the applicant and this was not disputed by both parties.

In his submission in support of appeal, counsel for the appellant stated that both parties have testified that there was a contract for rent at a consideration of TZS. 500,000/- per month for a period of six years. That the appellant has already paid TZS 40,000,000/- as a rent. That in order to prove payment, the appellant testified orally that she gave the landlord TZS 11,000,000/- and tendered exhibits P2, P3 and P7. That the appellant proved that she paid the rent for six years.

In reply, counsel for the respondents denied the claims and stated that the appellant has failed to prove that she has paid the rent.

Did the appellant adduce the evidence to prove that she has paid the rent?

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In her testimony, the appellant then as PW1, stated that she has entered a lease agreement with the 1st respondent. She was a tenant and the 1st respondent the landlord. That, at first they entered an oral agreement in 2017. In May 2018, they entered a written contract which was signed on 03/5/2018. The lease contract was from May, 2018 – May, 2024. She tendered the lease contract as Exhibit P5. PW1 stated further that she paid the rent amounting to TZS 11,000,000/- and she handed a car Toyota Land Cruiser worth TZS 29,000,000/- to Charles Chenza (2nd respondent) as part of rent payment. That later in September 2020, she received an eviction notice from the respondents, on the claim that she has not paid rent. She insisted that she has paid TZS 36,000,000/- as rent.

In cross examination, PW1 maintained that she has paid rent of TZS 36,000,000/-. She admitted that she has no receipt to prove that but she has lease contract. She admitted that the lease contract provided that the payment of rent should be through the Bank Account but she gave the rent money to Charles Chenza. (2nd respondent).

PW2, stated that she is a Co-Director of PW1. That they are tenants in the 1st respondent's business premises. That they have a lease agreement of six years from 2018-2024. When she was questioned by the assessor, she said that, PW1 told her that she has paid rent, but she has never seen the proof. She added that Exhibit P5 does not show whether the rent was paid.

On their defence, the respondents testified as DW1 and DW2. They claimed that the appellant failed to honour the lease contract by failing to

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pay rent as per their agreement in the contract that the same will be paid by depositing the rental money in NMB Bank account. They insisted that when they signed the agreement, the appellant has not yet paid any amount in the Bank. That they asked the appellant to pay the rent but to no avail. They tendered Exhibit D3 collectively which includes Demand Notice of payment of rent from the respondents to the appellant.

As asked earlier, the issue is whether on record there is a proof of payment of rent. According to Exhibit P5 which is a Lease Agreement, Clause 3.2 provides that;

> "3.2 *Payments payable under clause 3.1 hereinabove shall be paid through Bank, Account name: UNYIHA ASSOCIATES LTD and Operation Account No. 61203500221, NMB Bank and remit the original bank payment in slip to the landlord upon which* ***the land lord shall issue to the tenant a RECEIPT which shall be an evidence of rent payment in respect of the demised premises."***
> *(Emphasis mine).*

In that, the lease agreement provides that the rent payments shall be paid through a Bank and the bank slip remitted to the landlord who will then issue a receipt; and that receipt shall be the evidence of payment.

However, in her evidence at the trial, the appellant as PW1 did not tender the payment receipt which could have proven that she indeed, paid the rent. In her testimony, PW1 stated that she gave the money cash TZS 11,000,000/- which she gave to the 2nd respondent. I find that, the

appellant herself breached clause 3.2 of their lease agreement by her act of giving cash money to the 2nd respondent instead of depositing the same to the given bank account and giving a slip to the respondent as agreed per the lease agreement Exhibit P5. Furthermore, I find that, in the circumstances where the respondents are denying to have received any payment from the appellant, the appellant has failed to disprove their claims.

I have looked at Exhibit P3. It is an email which having read it, it shows correspondences between Charles Chenza to Halima Omary, the subject is about "FINISHING BUNJU RESIDENTIAL HOUSE'. I find that this email is not a proof of payment of rent because it is about Bunju residential house while the suit premises is a business premises by name WIZA HALL. Furthermore, in the email, the respondents does not acknowledge or admit to have received the payment of rent on the suit premises.

In addition, there is no proof that the car Toyota Land Cruiser which the appellant claimed to have given to the respondents was for rent payment. This is so because in the evidence, as per the agreement, the appellant was to deposit the money for rent in a Bank. DW2 (2nd respondent) has denied to have received the car as part of rental payment.

The only evidence to support the claim of the appellant that she gave a car to DW2 is exhibit P7. However, exhibit P7 is a collection of Police RB numbers and a photocopy of NMB Bank slip which shows that Charles Chenza deposited into the account of Dendego Halima Omari (Director of Appellant), a sum of TZS 1,000,000/- as payment for a car. However, the

contents of Exhibit P7 raise some questions, if the appellant handed over her car to the respondents as part of payment of rent, then why the respondent is paying the appellant TZS. 1,000,000/- for a car?
From this, I find that Exhibit P7 does not connect with claims of the appellant that she gave her car Toyota Land Cruiser as part of payment of rent. Even if she indeed gave the said car to the respondents, there is no proof that it was for rent payment and not for something else.

After analysis of evidence, I find that there is no proof on record that the appellant paid rent. The exhibits which she has adduced during the trial does not support her claims that she made the payments. In this status, I am inclined to agree with the findings and decision of the trial Chairperson that the appellant failed to prove that the rent was paid as she alleged. And that if the rent was paid, the appellant could have produced a proof on that which she did not. I also support the findings of the trial Chairperson that Exhibit P5 is a lease agreement which binds the parties, and that the rental payments should have been according to the clauses of the said agreement.

In the grounds of appeal No. 1,3,4 and 5, there is also claims by the appellant that, the respondents unlawfully breached the contract and that the trial Chairperson erred by upholding the counter claim by the respondents without considering that it was the same respondents who have breached the contract.

In his submission, counsel for the appellant stated that, the building (suit premises) is owned and managed by the land lord (the respondents) who

induced the tenant (the appellant) to get into business for their mutual benefits. That the parties entered into lease agreement for six years i.e. from 03/5/2018 to 02/5/2024, and that the contract for tenancy was admitted as Exhibit P5. He stated further that, before the expiry of the contract period, the respondents started to frustrate the appellant through a demand letter which required that appellant to vacate the premises. He argued that, the contract is still valid as the six years are not completed.

On the issue of counterclaim, the counsel for the appellant stated that, the trial Chairperson erred when he upheld a counter claim and ordered the respondent in counter claim to pay rent arrears without considering that the appellant has already paid a rent. That the records show that the appellant has paid TZS 40,000,000/- as a rent in a manner parties orally agreed. That, to prove that, the appellant tendered communication documents between the parties as exhibits P2 and P3.

In reply, the counsel for the respondents contended that, the rent was to be paid as per clause 3.1 of the lease agreement tendered as Exhibit P.5. That the claims of the appellant that she made a payment of TZS 11,000,000/-, and TZS 40,000,000/- and gave her car to the landlord are all baseless as they have no proof.

As per Exhibit P5, there was valid lease contract between the parties which binds them. The issue here is whether there is a breach of contract by the respondents as claimed by the appellant.

The respondents' claims that the appellant failed to pay the rent as required under clauses 3.1, 3.2 and 4.1 of the lease contract. Upon failure,

the respondents issued the appellant with a 30 days' Notice as per clause 7.1 of the lease contract.

It is my finding that, the appellant has failed to prove that the rent was paid as per the lease contract, therefore, the respondents did not breach the lease contract but they executed the clauses as stipulated in the contract. After the appellant's failure to pay the rent on due dates as stipulated in the contract, the respondents went on and issued a 30 days' Notice to the appellant which she admitted to receive and tendered the same as ExhibitP.8 collectively. The said Notice was also tendered by the respondents as Exhibit D3 collectively. As per the evidence on record, it was appellant who breached the contract when she failed to pay the rent in a mode stipulated under clauses 3.1 and 3.2 of the lease contract.

I have considered the argument by the counsel for the appellant that oral evidence being one of the method of receiving evidence in a Court of law, is crucial in proving particular fact and the Court is entitled to rely on it in reaching its conclusion.
The counsel went on to cite the Court of Appeal case of **Abas Kondo Gede vs. Republic,** Civil Appeal No. 472 of 2017 (unreported), which as per his reference, it was held that *"oral evidence is sufficient, without documentary evidence to prove factor (sic) or title".*

Mr. Chande, submitted further that in this appeal, in regard of the rent dispute between the landlord and tenant, the oral evidence sufficiently established that the landlord (2nd respondent), received his rent. That, the Chairperson erred in law when he neglected all oral evidence adduced by

the appellant before the trial Tribunal and find the same inadmissible and that it cannot be used to prove the payment of rent.

With due respect, I agree with Mr. Chande, counsel for the appellant that there was evidence that there was an oral agreement between the disputing parties. Although this was disputed by the respondents, the appellant stated during the trial that their contract started as oral contract in October, 2017. Later in May, 2018, the parties entered a written contract which was signed by both parties on 03/05/2018 and tendered during trial as Exhibit P5.

I again, agree with Mr. Chande that, oral evidence is admissible under our law of evidence as provided by sections 61 and 62 of the Evidence Act, Cap 6 R.E 2019. However, I find that the case of **Abas Kondo Gede vs. Republic (supra)**, is distinguishable from the present matter. This is because in the present matter, in the beginning there was oral agreement but it was later reduced into written agreement.

I am of the view that it was an obligation of the parties to ensure that the terms of their oral agreement are also comprised in the written agreement to form part of the contract. In the circumstances that the oral agreement vary with the contents of the written agreement, the Court will always rely on the written agreement for the proof of facts in dispute.

In the case of **Dr. A. Nkini & Associated Ltd vs. National Housing Corporation**, Civil Appeal No. 72 of 2015 which was determined in 2021, the Court of Appeal was of the view that, if the terms of an agreement

are written, then oral evidence suggesting variation of such terms may not be acceptable. The Court of Appeal went further and reiterated its decision in the case of **UMICO Limited vs. SALU Limited,** Civil Appeal No. 91 of 2015 (unreported) where it was stated that;

"*We wish to begin by stating that it is trite principle of law that generally* ***if the parties in dispute had reduced their agreement to a form of a document, then no evidence of oral agreement or statement shall be admitted for the purpose of contradicting, varying, adding or subtracting from its terms*** *(see also SS. 100 and 101 of the Evidence Act, Cap 6 R.E 2002)". (emphasis added).*

Basing on the above principle and also having read the provisions of Sections 100 and 101 of the Evidence Act, Cap 6, R.E 2019, I agree with the findings of the trial Chairperson when he based his decision on the documentary evidence adduced during the trial particularly on the lease contract as Exhibit P5.

I find that the trial Chairperson, basing on this documentary evidence, was right when he upheld the counter claim by the respondents. By this analysis, I find grounds 1, 3, 4 and 5 to have no merit and I dismiss them.

On ground 6, the appellant stated that, the trial Chairperson erred when he denied to adopt the construction costs of property in dispute from the applicant on the ground that it had no signature and stamp while adopting the construction costs adduced by the respondents while also had no signature and stamp of the writer.

In his submission, Mr. Chande for the appellant stated that, the trial Tribunal was supposed to determine the issue on whether the renovation was done or not. That Exhibits P6 and P11 proves that the renovations were done. That, the trial Tribunal denied to consider the documents tendered by the appellant for the reasons that they were not stamped.

In reply, counsel for the respondents submitted that, the trial Tribunal was right to deny adopting any constructions costs of the appellant, because the appellant has failed to prove if she made any improvements to the disputed premises. That the appellant did not tender any receipt to prove that she bought any materials. He stated further that, Exhibit P11 mentioned only the list of materials and the price. That the same cannot be used as evidence that the appellant incurred the said costs as there is no title on the document any no any other information concerning the renovations of the suit premises.

In her evidence during the trial, PW1 stated that, she entered a preliminary oral contract with the respondents (the landlord) in 2017. That they started renovations on the suit premises. That the money for renovations were issued by her the appellant and the 1st respondent.

That she issued TZS 40,000,000/- and the 1st respondent issued TZS 5,000,000/-. She said further that, she bought building materials for renovations, and she gave the 1st respondent TZS One Million for the purpose of buying chairs. She tendered Exhibit P2 which she said it was an email which express about the chairs she bought, renovations of the business premises and other things. The appellant also tendered Exhibit

P3 which shows the amount of money which she gave to the 1st respondent. In addition, the appellant tendered Exhibit P6 collectively which are the pictures of the suit premises before and after renovations. PW2 also tendered Exhibit P11 which is a list of building materials which was allegedly used for renovations of the suit premises by the appellant.

In order to determine the merits of ground No. 6 of the appeal, I went through exhibits tendered by the appellant during the trial particularly Exhibits P2, P3, P6 and P11 which the appellant relied upon to prove that she indeed renovated the suit premises.

Exhibit P2 is an email from Charles Chenza to Halima Omary, and it is about finishing Bunju Residential House. I agree with the finding of the trial Chairperson that this exhibit has no connection with suit premises.
Exhibit P3 is a list of building materials worth TZS. 103,000,000/-. This document does not connect with the suit premises as it shows the construction of a house where it is not put clear which house. It only shows "JUMLA KUU YA KUMALIZIA NYUMBA". It does not indicate whether this 'NYUMBA" is the suit premises.
Exhibit P6 is a collection of photos of a suit premises which also does not prove the renovations claims by the appellant.
Exhibit P11 is also a list of building materials which has no any explanation of the connection of that list to the current suit.

From this, I find that ground No. 6 of the appeal has no basis. This is because, the construction costs of the suit premises which were tendered by the appellant were admitted in Tribunal as exhibits. The trial

Chairperson considered them in his analysis of evidence and found that those tendered exhibits by the appellant did not prove that the same renovated the suit premises. I also dismiss ground No. 6 of the appeal.

Lastly, I will deliberate ground No. 2 of the appeal which states that the trial Chairperson erred by neglecting Section 24 of the Land Disputes Courts Act, Cap 216 by differing with assessors opinion without giving reasons.

The involvement of assessors during trial is mandatory under section 24 of the Land Disputes Act. It provides that, the Chairman shall take into account the opinion of the assessors but shall not be bound by it. It is provided further that, if the Chairman differs with the assessors' opinion, in his judgment, he shall give reasons for doing so.

I have gone through the judgment of the trial Tribunal, and I am of the view that the trial Chairperson complied with the requirements of Section 24 of Cap 216. It is true that he differed with the opinion which was given by the assessors but the trial Chairperson gave reasons for doing so. This is reflected at page 19 of the judgment where the trial Chairperson said;

"Kutokana na sababu kwamba Mdai hajalipa kodi ya pango napingana na maoni ya waungwana wazee wa baraza. Madai ya Mdai hayana msingi wowote kwani amevunja mkataba kwa kutokulipa kodi ya pango ya eneo hilo".

From this, I also find that ground No. 2 of the appeal has no merit and I dismiss it.

From the analysis of the evidence, having considered the submissions and authorities adduced by the parties on this appeal represented by their counsels, I do not find any reason to differ with the decision, judgment and decree of the District Land and Housing Tribunal of Kinondoni at Mwananyamala, and I hereby uphold it.

The appeal is dismissed in its entirety, with costs. Right of Appeal is explained.

'T is so ordered.

Dated at Dar es Salaam this 19th day of April, 2022.

A. MSAFIRI

JUDGE