IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 56 OF 2022

(Originating from the Judgment of the District Land and Housing Tribunal of Kinondoni District at Mwananyamala in Land Application No. 284 of 2018)

PUSH MOBILE MEDIA LIMITED ..... APPELLANT

VERSUS

AMOS MISANA MABAGALA ..... RESPONDENT

JUDGEMENT

Date of Last Order: 02/06/2022
Date of Judgment: 28/6/2022

A. MSAFIRI, J

The brief background of this appeal is that, the appellant and the respondent entered into a lease agreement in 16/3/2015. The appellant is a Media Production Company which was a tenant, leasing the respondent's one storey building located at Ada Estate Area, Kinondoni Municipality, Dar es Salaam (herein as suit property). It was agreed that the appellant lease the suit property for two years i.e. from 01/02/2021 to 31/01/2017 at a monthly rent of USD 4,000.00 only which has to be paid annually in one installment.

That, the appellant failed to pay rent as agreed, where it was claimed by the respondent that, the appellant only paid the rental amount for the month of February to March 2016, but has not paid the remaining rent until todate.

The respondent instituted Land Application No. 284 of 2018 before the District Land and Housing Tribunal of Kinondoni at Mwananyamala (herein as trial Tribunal). Among other reliefs, the respondent sought for a declaratory order that the appellant has breached the lease agreement without good cause, and an order of payment of sum of USD 85,285.00 to him as rent arrears as at February 2018.

The appellant denied the claim and filed a written statement of defence, praying for the dismissal of the application with costs.

After the trial, the trial Tribunal decided in favour of the respondent, and granted the reliefs prayed. The appellant was dissatisfied and lodged the current appeal with six grounds which are as follows;

1. That the trial Chairperson of the Tribunal erred in law and fact by shifting the burden of proof from the Respondent case to the Appellant.
2. That the trial Chairperson of the Tribunal erred in law and fact by relying on the demand notice as poof of rent arrears and proof of the terms and conditions of the Lease agreement between Respondent and the Appellant.

3. That the trial Chairperson erred in law and in fact by holding that the Respondent's evidence is heavier and more proved the Respondent's claims against the Appellant.
4. That the trial Chairperson erred in law and in fact by holding that the Appellant failed to produce or does not have the evidence to show that she made any payments of rent.
5. That the trial Chairperson erred in law and in fact by holding that the Respondent is entitled to legal rights as it was rendered in the case of Hemedi Said V. Mohamed Mbilu (1984) TLR 113 High Court.
6. That the trial Chairperson erred in law and in fact by awarding the Respondent a total of USD 85,286 being rent arrears up to February 2018 and USD 4,000 per month from 01/03/2020 without any proof of the Respondent's claims against the appellant.

The appellant prayed for the court to set aside the judgment and decree of the trial Tribunal.

By the leave of the court, on the mutual consent of the parties, the appeal was heard by way of written submissions. The appellant's submissions were drawn and filed by Jerry Msamanga, advocate while the respondent's submission was drawn and filed by Evance John, advocate. I have carefully read the submissions by the rival parties along with the records on the Court file and I have considered them in the determination of this appeal.
The issue before me is whether the appeal is meritorious. It is my view that the appeal is centred on the major question i.e. whether the rent arrears were paid by the appellant or not.

Going though the proceedings, I have observed that there is no dispute to the fact that the appellant was a tenant of the respondent, and they have signed a lease agreement where the respondent leased out the suit property to the appellant on the terms they have agreed. The only dispute in this matter is that the respondent claims that the appellant has breached the lease agreement by failing to pay the rent amount as agreed. At the same time, the appellant denied the claims and put the respondent to strict proof.

Having established that, I will determine the grounds of appeal advanced by the appellant. It is my view that the 1st, 2nd, 3rd 4th and 5th grounds of appeal are interrelated and I will consolidate them in my determination. These grounds of appeal are centered on the issue that, the trial Chairperson erred when he shifted the burden of proof from the respondent to the appellant while it was the duty of the respondent to prove his case.

In the written submissions by Mr. Msamanga, he stated that, it is the requirement that the standard of proof in civil cases is on balance of probabilities. It is the duty of both parties to provide evidence in Court to prove their cases. That, it was erroneous for the trial Chairperson to shift the burden from the respondent to prove the rent arrears was not paid by the appellant. That, the respondent failed to prove the claimed rent arrears and that is why the trial Chairperson opted to shift the burden of proof to the appellant. He said that it was erroneous for the trial Chairperson to hold that, since the appellant has not denied the allegation that he has not

paid the rent arrears, and that he has not proved any payments then he should pay the rent arrears. He pointed that, the appellant did not agree to have not paid the rent arrears as decided by the trial Tribunal.

According to Mr. Msamanga, the evidence adduced by the appellant during the trial was enough to prove that there was no rent arrears on the part of the appellant.

In his reply submission, Mr. John, argued that, by the evidence of the appellant's witness one Hafidh Shamte (DW1) he told the Court that the respondent did not issue them with any invoice for payment. That, DW1 stated further that, had any invoice for accrued rent been issued to the appellant, the same would have paid against such invoice. According to Mr. John, this testimony by the witness of the appellant corroborates the evidence of the respondent that there are rent arrears unpaid by the appellant.

In rejoinder, Mr. Msamanga maintained that, when DW1 was testifying in Court, he stated that there was no rent arrears payable to the respondent and had there been any rental arrears, the respondent would have issued invoices in relation to the said rental arrears.

In order to determine the issue on whether the rent was paid or not by the appellant, I had to go through the proceedings and see the evidence which was adduced by parties during the hearing at the trial Tribunal.

Before the commencement of the trial, the issues framed were first, whether the respondent is indebted of rent arrears; second if the first issue is in the affirmative, to what extent the respondent is indebted, and third; to what reliefs parties are entitled to.

The respondent (who was then the applicant), testified as PW1 and stated that, the appellant was his tenant by a lease agreement entered between the parties. He attempted to tender the lease agreement but failed after there was objection from the opponent party that the said agreement was not duty stamped as per the requirement of the law. Nevertheless, PW1 went on testifying that since 2016, the appellant has defaulted to pay rent, and that he claim USD 85,286 as an outstanding rent.

That, PW1 reminded the appellant several times but she did not respond. He decided to take legal action through Mac & Asociates Advocates which issued a Demand Notice to the appellant, reminding her on payment of rent. He tendered the Demand Notice which was admitted as Exhibit P1. PW1 said that, the appellant responded by a letter, which was admitted as Exhibit P2. That, the appellant stated that they were ready to negotiate with the respondent. That, the appellant claimed to have paid rent but she has not paid the same. PW1 stated further that on 04/05/2020 the respondent (appellant) vacated the suit premises. By that time, about 48 months period have lapsed and at USD 4000 per each months which equals to a total of USD 192,000/-

In cross examination, PW1 stated that the lease agreement was from 01/2/2015 to 31/01/2017. He said that he have no invoice for claiming of house rent from the respondent. He said further that payment of rent was by Bank Account, and he claimed for the rent by a written letter or sometimes orally. He said that the rent paid was for the year 2015, and for the year 1st February, 2016 to 31/01/2017 he was paid only USD 29,000/- amounting to seven month's rent, leaving the unpaid rent for 48 months. That was the evidence of the applicant during the trial.

On the defence, DW1 Hafidh Shamte, the Director of the appellant, appeared and testified that, his company has leased the suit premises from 2012 – 2016. That, the rent per month was USD 4200, and later was reduced to USD 4000. He stated that if there is invoice issued by the landlord then it must have been paid. He said further that, he has never seen an invoice from the applicant about the rent payment, and they could not have paid without invoice. In cross examination, DW1 admitted that they have been renting the applicant's place (suit premises) from 2012 – 2016. He said that further that they have vacated the premises, and that it is true that the respondent owe them about a thousand USD and more, and that he has no evidence of payment.

This is the first instance appeal, so as the appellate Court I am obliged to go through the evidence on record, make re-evaluation and come with decision which may vary or be similar to the one by the trial Court. (See the case of **Mapambano Michael @ Mayanga vs. R,** Criminal Appeal No. 268 of 2015, CAT at Dodoma (unreported).

I have gone through the available evidence, the respondent claimed that, under the two year lease agreement 01/2/2015 – 31/1/2017 entered between the respondent and appellant, the appellant paid only part payment of the agreed rent, and failed to pay the remaining amount which is USD 29,286.00. That in total, the applicant demand USD 85,286.00.

The trial Chairperson decided that the applicant's evidence was heavier than the respondent and that the respondent did not produce any evidence to disprove the applicant's claims and prove that the rent was paid. In this, I am in agreement with the trial Chairperson's findings that the respondent's/applicant's evidence was heavier than the appellant's/respondent's.

The applicant, in support of his oral claims, he tendered exhibits P1 and P2. Exhibit P1 is a demand Notice of payment of sum of USD 57,286.00, dated 17/7/2017. Clause 5.0 of the said Notice reveal several follow up on the rent payment by the respondent to the appellant with no response from the same.

Exhibit P2 is the reply by the appellant through her advocate, dated 17/8/2017. Under clause 3 of the said letter, the appellant stated that she is still ready and willing to pay the rent arrears if any. Under clause 4, the appellant stated that she is willing to have a mutual discussion with the respondent so as to reconcile the books of account and identify the exact amount remained if any from the payments which have already been paid.

In her defence, the appellant did not came out and outrightly deny the claims by the respondent but she was rather evasive. Her main defence was that there was no invoice which was issued to her by the respondent to task her to pay the rent amount.

In DW1's main evidence, he averred that, and I will quote herein bellow;

> *"Sijawahi kuona invoice/ankala ya madai toka kwa mdai ambayo inayohusiana na madai ya kesi hii na hatungeweza kulipa bila kuletewa ankala"*

In cross examination he stated that;

> *"Tumeshaondoka kwenye nyumba sikumbuki lini tumetoka. Ni kweli kama tunadaiwa USD laki na zaidi. Sina ushahidi wa kulipa hilo deni".*

In Re examination, DW1 stated;

> *"Mdai hajawahi kulete madai ya USD 192 kwa mdaiwa. Utaratibu madai lazima yawe kwa kuanzisha invoice"*

From this, the appellant is raising a defence that she was not issued with invoice from the respondent so at to make the claimed payments. This is reflected in the appellant's submissions through the learned counsel Mr. Msamanga that, there was no invoice for payment issued by the respondent and if there is, then the respondent has already been paid.

In his opinion, Mr. Msamanga believes that, the lack of invoice of payment is the proof that there are no rent arrears. Also he maintains that, as per

Exhibit P2, in case of any rent arrears, then reconciliation should have been done in order to discuss the said arrears, but the respondent never showed any cooperation. Mr. Msamanga believes that, since the reconciliation never took place, then it implies that there are no any rent arrears.

With respect, I disagree with Mr. Msamanga's position and beliefs. The non-issuance of invoice cannot be a conclusive proof that there was no rent arrears and that, if there was any, then they were paid.

In the whole evidence from both parties, there was no evidence on the agreed mode of payment between the parties. It was not revealed whether it was agreed between the parties that the payment process will be by the issuance of invoice from the respondent and then after that, the payments by the appellant.

There are various mode of payments, i.e. by oral reminder and then direct cash payment by depositing the amount in the described Bank account or by issuing of invoice first and then payment is done.

The only glimpse on mode of payment was shown by the respondent in cross examination when he stated that;

"I used to claim rent by written letter or sometimes orally"

By this, the respondent was admitting that he has no invoice for claiming of house rent from the appellant. But, he used to claim by

written letter or sometimes orally. Therefore, the appellant's claims that he was not issued with invoice to make payments cannot stand.

Furthermore, the appellant claims that Exhibit P2 shows that he did not admit to have defaulted payment of arrears, but what he admitted was negotiations on roundtable to discuss on the rent arrears "if any". That, failure of the respondent to come to the roundtable means that there was no arrears. In this, I find that, the words "if any" did not exonerate the appellant from the fact that he wrote Exhibit P2 in response to Exhibit P1 which was recognition of existence of rent arrears. Also, the fact that the appellant was willing to have a mutual discussion with the respondent on the rent arrears "if any", then it is a proof that the respondent's claims against the appellant was valid.

I am aware of the legal requirement in evidence that he who alleges must prove. This is stipulated under Section 110 of the Evidence Act, Cap 6 R.E 2019.

In his judgment, the trial Chairperson found the evidence of the applicant heavier than that of the respondent. The appellant's major grievance is that the trial Chairperson erred when he shifted the burden of proof from the respondent to the appellant; and failed to consider the appellant's evidence.

I have analysed both evidence and it is my view that the trial Chairperson did not err when he found the respondent's evidence heavier than the appellant's. This is because the respondent's oral evidence was also supported by Exhibits P1 and P2 which help to prove that indeed there was demand of rent payment which was unpaid by the appellant.

On the side of the appellant, as I have said, her evidence was evasive, and at one time in cross examination, DW1 admitted that they owe the respondent about USD 1,000 or more.

Was the trial Chairperson right in shifting the burden of proof as claimed by the appellant?
Section 115 of the Evidence Act (supra), provides that; in civil proceedings, when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Guided by this, I find that, the appellant also had knowledge and was in a position to give evidence to his defence that the payment was done instead of being evasive.

The Court of Appeal in the numerous cases, has laid down guiding principle on the burden and onus of proof in civil matters. In the recently decided case of **Yusufu Selemani Kimaro vs. Administrator General & 2 others,** Civil Appeal No. 266 of 2020 CAT at Dar es Salaam (unreported),it was laid down as follows;

"To demystify, the burden of proof is the duty or responsibility cast on a party to put forth evidence in order to prove their claim.

In civil cases, as a general rule, it is the party bringing the claim (the plaintiff) on whose shoulder the burden of proof lies. However, after the plaintiff has led evidence either in the form of oral testimony, documentary evidence or objects, the burden of proof as a matter of adducing evidence or the onus of proof (as it is otherwise called to distinguish it from the burden of proof which never shifts) shifts to the defendant to lead evidence either with the view to controverting the plaintiff's evidence or supporting his own case.

According to the English case ***of Pickup V. Thames Ins. Co 3 ZBD, 594,600,*** *the burden of proof in this sense, is always unstable and may shift constantly throughout the trial accordingly as one scale of evidence or the other preponderates". (emphasis mine).*

Guided by the above principle, I am of the view that, after the respondent having adduced his evidence, it was the obligation of the appellant to disprove the evidence/claims by the respondent. However, instead of adducing evidence to counter the claims by the respondent, the appellant gave evasive denials which made the respondent's evidence heavier than the appellant. For these reasons,

I find grounds No. 1,2,3,4 and 5 of the appeal to have no merit and I dismiss them.

On the 6th ground, the appellant stated that the trial Chairperson erred by awarding the respondent a total of USD 85,286 being rent arrears up to February 2018 and USD 4000 per month from 01/3/2020 without any proof of the respondent's claim against the appellant. In the submissions, the appellant has consolidated grounds 5 and 6 and argued that the trial Chairperson erred in holding that the respondent's evidence was heavier compared to the appellant and went further to award USD 85,286 without any proof of the claims.

This need not take much time. As I have analysed herein before, the trial Chairperson's decision was based on the claims presented by the applicant before the trial Tribunal and his evidence to support it. The appellant also presented his evasive response and evasive evidence.

The trial Chairperson, finding the evidence of the applicant weighed heavier on balance of probabilities, proceeded to award the reliefs prayed by the applicant in his application. It is my view that the trial Chairperson was correct to award the claimed reliefs. I have also noted that the appellant does not challenge the award of other reliefs but he dispute only the award of USD 85,286. I find also the 6th ground of appeal to have no merit and I dismiss it.

From the foregoing, I see no reasons to differ with the findings and judgment of the trial Tribunal, hence, I dismiss this appeal in its entirety.

The appellant shall bear the costs of the appeal. Right of appeal explained.

Order accordingly.

Dated and Signed at Dar es Salaam this 28th June, 2022.

A. MSAFIRI

JUDGE