

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)**

AT DAR ES SALAAM

LAND CASE NO. 68 OF 2018

ZAINAB G. H. ISMAIL.....PLAINTIFF

VERSUS

**EXXON MOBIL EXPLORATION &
PRODUCTION TANZANIA LTD.....DEFENDANT**

JUDGMENT

11/05/2022 & 20/07/2022

Masoud, J.

The context in which the plaintiff herein claims for among other things unpaid rents and interest, vacant possession, damages, and costs of the suit against the defendant is founded on allegations of breach of an undisputed five year lease agreement that the plaintiff concluded with the defendant on 15/08/2013. The agreement was to run from 1st October, 2013 to 30th September, 2018 and was in respect of residential premises in Plot No. 1400 Msasani Kimweri, Dar es Salaam.

The allegation by the plaintiff as averred in her plaint is that the defendant wrongfully and unlawfully terminated the agreement on

30/03/2017. In so doing, the defendant prematurely issued a purported notice and an email terminating the lease before the lapse of the fourth year of the lease term. Notwithstanding the purported wrongful and unlawful notice of termination, the defendant did not vacate the premises. Rather, she sought for extension and unilaterally assumed the same was proper, remained in possession of the premises and the keys thereof, and did conduct any inventory establishing whether the premises remain tenantable prior to handing over of the premises to the plaintiff.

Subsequently, the defendant notified the plaintiff of a fire outbreak in the premises. The plaintiff was as a result given a controlled access by the defendant's security guard, and observed the damaged on the premises caused by the fire.

Despite wrongfully continuing to occupy the premises as from 01/09/2017 which was allegedly in breach of the lease, the defendant never paid rents and interests amounting to USD 213,346.37 or its equivalent in Tanzanian Shillings. The plaintiff's request for access and repossession of the premises was not heeded to by the defendant which meant that the premises could not be viewed by potential tenants. The

plaintiff's attention was once drawn to a purported unilateral settlement agreement prepared by the defendant which she turned down as the same was in breach of the lease, and did not cater for her interest including the defendant's overstay on the premises. The plaintiff's demand for the payment of outstanding rent, and compliance with the lease agreement proved futile.

The defendant, on her part, disputed in her written statement of defence the allegation of breach of the lease agreement which she did not, however, dispute its existence. She disputed all of the claims associated with the allegation of breach of the lease agreement. On the other hand, she admitted in her averment that she concluded the lease agreement with the plaintiff on 15/08/2013, which was to run for five years from 1st October, 2013 to 30th September, 2018.

According to the averments in the written statement of defence, the basis of disputing the plaintiff's claims was that the defendant lawfully terminated the lease agreement, and surrendered the occupation of the demised premises on 03/11/2017 to the plaintiff. With such defence, the defendant maintained that the premises were surrendered in the same

tenantable condition as was at the commencement of the lease agreement.

As to her right to terminate the said lease agreement, the defendant stated that the lease agreement only provided for non-termination of the lease during the first four years of the said lease. However, either party to the said lease agreement could terminate the lease after a period of four years of the commencement of the lease term, upon issuance of a six month notice.

In relation to the foregoing averment, it was further averred that when the said period of four years of the five year- lease term ended on 30/09/2017, the defendant lawfully issued the disputed notice of termination of the lease agreement on 30/03/2017, which notice was effective on 01/10/2017. While disputing the allegation of continuing the possession of the premises after the issuance of the disputed notice, the defendant had it that she met the plaintiff on 20/09/2017 regarding the defendant's intention to move from the premises, and hence the defendant's letter dated 29/09/2017 to the plaintiff declining a counter offer by the plaintiff.

In addition to the foregoing, the defendant stated in her written statement of defence that she invited the defendant by a letter dated 25/10/2017 for an inventory and handing over of the premises on 03/11/2017 which was to take place after the defendant had finished to vacate from the premises. However, the plaintiff by a letter to the defendant dated 01/11/2017 refused the invitation to hold the inventory and demanded the defendant to issue a new notice of termination regardless of the requirements of the lease agreement.

The foregoing notwithstanding, the defendant alleged in her defence that she vacated from the premises on 03/11/2017. Despite agreeing with the plaintiff through her officer one Fidelia Mwehesa, and one Ally Kachra, the plaintiff's representative, to conduct the inventory from 1/11/2017 to 13/11/2017, the plaintiff or her agent did not turn up for the exercise.

Subsequently, the inventory was conducted on 25/11/2017 and the property was handed over to the plaintiff in the same tenable condition as was at the commencement of the lease agreement. Thus, a payment of USD 19,487.22 was made in the favour of the plaintiff for the period the defendant continued to be in possession of the premises from

01/10/2017 to 03/11/2017, following the termination of the lease On 30/09/2017.

However, the keys were according to the defendant's averments in the written statement of defence, returned to the plaintiff by post on 25/05/2018. The said keys were so returned as it is alleged by the defendant that the plaintiff refused to receive the same in more than one occasion. The plaintiff had nevertheless, it is alleged by the defendant, complete access to the premises even before the return of the keys by post and was well informed of the fire incidence.

The foregoing was regardless of security guards employed by the defendant at her own cost to secure the premises. While disputing the allegation of unilateral settlement agreement, the defendant had it that she made several attempts for amicable settlement. The same were notwithstanding the valid notice of termination that she issued.

Considering the allegation by the plaintiff as set out in the plaint and the disputed allegations by the defendant as set out in the written statement of defence, this court recorded two issues for determination. The first

was whether there was a lawful termination of the lease agreement, and secondly, to what reliefs are parties entitled.

The plaintiff was during the trial represented by Mr Deogratias Ringia, Advocate, while the defendant was represented by Mr Gerald Nangi, Advocate. The plaintiff testified as PW.3, and in addition, she had Zulffikri Ismail who testified as PW.1, Singo Lwinuko Mdegela who testified as PW.2, and Gulam Ismail who testified as PW.4. On the other hand, Mark Frazer who was the only witness for the defence as DW.1. I considered the evidence on the record which was adduced by the witnesses. But for purposes of determining the issues at stake, I will not reproduce the evidence in its entirety.

As was in the pleadings, the lease agreement was not disputed in evidence. It was tendered by PW.1, who was according to PW.3 allowed by her to manage affairs relating to the leasing of the premise, and was admitted in evidence as Exhibit P.2 without objection from the defendant. The said witness testified on various aspects of the lease agreement which PW.3 testified to have signed although she could not recall its contents.

Of significance however is the evidence of PW.1 that the lease term was for five years from 1/10/2013 to 31/09/2017 and that the monthly rent at the signing of the lease agreement was USD 1670.00. On the part of PW.3 who admitted to have signed the agreement, she had nothing to testify on other than that she signed the agreement, she left her son (PW.1) to manage the affairs involving the property which is registered under her name, and that she could not recall the contents of the said lease agreement.

As to the disputed termination of the lease agreement by the defendant, the notice of termination dated 13/03/2017 referred by the parties in their pleadings was tendered by PW.1 and admitted in evidence as Exhibit P.2 without any objection from the defendant. The same was to the effect that the defendant would effectively terminate the lease on 01/10/2017 which was six months after the issuance of the notice.

The background relating to the eventual issuance of the notice was by and larger adduced by PW.4 who also tendered Exhibits P.11, P.12 and P.13 to evidence the concerns by Mark Frazer's(DW.1) on the demised premise and Exhibit P.14 to evidence further communication made in respect of payment of rent to cover the period of continued occupation

of the premise. Upon being cross-examined, PW.4 admitted not to have brought to the court responses by the plaintiff to Exhibits P. 11-14.

It was PW.1's testimony that the notice was not consistent with the lease agreement. The lease agreement, according to PW.1, could only be terminated by either party after the fourth year of the lease term counting from the date of its commencement. It was his evidence, even when he was cross-examined by the defendant's Advocate, that the notice of termination was premature as it was issued after the lapse of three and a half (3½) years of the five year-lease term contrary to the requirements of clause 3(f) of the lease agreement.

It was the testimony of PW.1 that the defendant did not vacate the premises on 01/10/2017, notwithstanding the disputed notice of termination which the defendant issued. The evidence was thus led to the effect that the defendant continued to occupy the premises after the effective date of the disputed notice, and did not pay rent for the period of continued occupation as intimated in Exhibit P.14, which is a letter by the defendant to the plaintiff dated 19/12/2017 tendered in evidence by PW.4.

Several instances, including the fire outbreak incident, as per Exhibit P.5, and the attempted settlement involving one Mark Frazer (DW.1), were referred in the testimony of PW.1 to evidence the continued occupation of the premise. It was said that the occupation continued despite attempts by the plaintiff to regain possession of the premises as evidenced by Exhibit P.6 tendered by PW.1 and as testified also by PW.4. According to PW.1, the plaintiff finally gained access to the premise through the intervention of the office of the relevant local government and thereby took possession of the premise on 15/09/2018.

There was evidence about the outstanding rent and interest to be settled by the defendant which according to PW.1 amounted to Tshs 213,346 as exhibited in Exhibit P.6 tendered by PW.1. In cross-examination, PW.1 admitted that the plaintiff was paid by the defendant sometime in April, 2018, a total sum of USD 19468.00 pursuant to Exhibit P.9, and explained how inventory was conducted on 28/11/2017.

The evidence of DW.1 admitted and recognized the lease agreement which the defendant entered with the plaintiff. It was his testimony that the defendant issued a valid notice of terminating the agreement under clause 3(f) of the said agreement, which notice was duly served to the

plaintiff. DW.1 thus recognized Exhibit P.2 as the notice of termination of the lease which was issued by the defendant. DW.2 further stated that subsequent to the said notice, the plaintiff replied by a letter disputing the validity of the notice in that it was not issued in accordance with the lease agreement.

There were final submissions filed by the counsel for the parties. The same made sense of the evidence in relation to the pleadings and the issues for determination. They were brief and focused.

The plaintiff's final submissions in their generality invited the court to take account of the undisputed notice of termination issued on 13/03/2017 when the lease had just only 3½ years since its commencement, the overstay of the defendant at the suit premise past 30/09/2017, and the action of the defendant of remaining in the suit premise and not giving vacant possession of the said premise in finding that there was a breach of the lease agreement by the defendant.

On the other hand, the defendant's final submissions were in nutshell to the effect that there was no proof from the plaintiff that the provision of clause 3(f) of the lease agreement which provides for the right of the

parties to terminate the lease agreement was violated by the defendant when the disputed notice of termination was issued on 13/03/2017. In relation to such stance issues were raised for this court's consideration as to the credibility of PW.1, PW.3 and PW.4, regard being had to the demeanour of PW.4 and the fact that PW.1 and PW.4 were not privy to the lease agreement and PW.3 having in her testimony nothing worthwhile to testify upon. On the issues, I was mindful of the transactions in the record that were done by the witnesses without any objection by the defendant whatsoever.

I am, on my part, satisfied that there was, indeed, a lease agreement, herein admitted as, Exhibit P.1, concluded between the plaintiff herein and the defendant. The same created a five year lease term running from 01/10/2013 to 30/09/2018. Admittedly, clause 3(f) of the lease agreement provided for the termination of lease agreement by either party to the agreement. I am equally satisfied that the said clause set out conditions that must be met for the termination of the lease to be valid. The clause read thus, and I quote:

3(f) Neither party may terminate the lease during the first four years of the term of the lease.

Thereafter, either party may terminate the lease provided six (6) months written notice has been served.

It is evident from the above clause that the first condition is that the first four years of the five year-lease term must have elapsed for either party to the lease agreement to be able to terminate the lease. And the second condition is that a party wishing to terminate the lease must have issued and served to the other party a six (6) months' written notice of termination of the lease term prior to the termination of the lease term becoming effective.

In the present case, the lease agreement was undoubtedly for a period of five years as shown above. Reckoning from its commencement on 01/10/2013, I have no doubt that the fourth year of the five year lease term commenced on 01/10/2016 and ended on 30/09/2017. It therefore meant that the lease could be validly terminated any time after 30/09/2017. The evidence of both parties herein has it that the six (6) months' written notice of termination, undisputedly admitted as Exhibit P.2, was undisputedly issued on 30/03/2017 and accordingly served, and was to be effective on 01/10/2017 after a lapse of a period of six months envisaged in the said notice.

When the said six (6) months' written notice of termination of the lease was issued on 30/03/2017 and accordingly served, it was already within the fourth year of the five year-lease term and it was, to be precise, just six (6) months before the expiry of the first four years of the five year – lease term on 30/09/2017. It therefore means that the notice of termination (Exhibit P.2) was effective on 01/10/2017 which is and falls on the fifth year of the five year-lease term.

It suffices to say that while the notice was issued during the fourth year of the lease term, the effective date of termination was on 01/10/2017, which is not within the first four years of the lease but within the fifth year of the lease term. As there is nothing in the lease agreement prohibiting issuance of a notice during the fourth year of the lease term, I am of the finding that the notice was validly issued as it was to take effect after the fourth year of the lease term as shown above. In this respect, I am satisfied that the construction of the clause only prohibited termination of the lease term during the first four years and not issuance of the notice which becomes effective after the expiry of the first four years of the five years- lease term.

Consequently, I am in view of the foregoing of a considered finding that the termination of the lease term by the issuance of the notice of termination, was lawful notwithstanding the refusal of the plaintiff to accept the notice. The plaintiff's refusal to accept the notice is not disputed. It is admitted by the plaintiff, and the defendant, in their respective pleadings and evidence as already shown above. I have no doubt in my mind that the said refusal which is also signified by a letter by the plaintiff to the defendant refusing the said notice as is apparent in the testimony of PW.1 negatively affected steps which were to be taken following the issuance of the said notice.

Before I make any further progress in connection with the above findings, it is a noteworthy that there is a complaint that the defendant continued to occupy the premise notwithstanding the issuance of the notice. With regard to the complaint, I was shown by the plaintiff's witnesses and in particular PW.1 and PW.4 instances supporting the continued occupation. As to the defendant, I understood her in the pleading, and her evidence as adduced by DW.1, that she could not handover the suit premise pursuant to her notice of termination as she did not get cooperation from the plaintiff, and also due to the fact that

they were at some point engaged in a settlement, evidenced by Exhibit P.3, in vain.

The evidence of both parties indicated that the property was eventually taken by the plaintiff. While the defendant has it in her evidence that she vacated from the premise on 03/11/2017, having sought from the plaintiff one month extension, and the protracted inventory conducted on 25/11/2017 and the premise handed over to the plaintiff in the same tenable condition, the plaintiff has it that it was not until the local government office of the relevant area was involved that she gained access and possession of the suit premise on 15/09/2018. The latter was not however supported by the plaint which had it that the defendant was still yet to vacate the premise and handover the same to the plaintiff. I say so as I am mindful that there was no amendment of the plaintiff's pleading in such respect which was sought and granted and which would have supported the evidence adduced by PW.1.

In so far as the defendant is concerned, there was evidence of the testimony of DW.1 to the effect that there was an inventory conducted on 25/11/2017 after the defendant had vacated the premise, which is also consistent with the evidence adduced by PW.1 in cross-examination

that there was indeed an inventory witnessed by PW.1 and the defendant's officers on 28/11/2017, and from which it was evident that the premise was habitable. Despite the slight difference on the dates of the inventory as per DW.1 and PW.1, it is a fact that there was indeed such inventory.

With regard to the said inventory, it was a further evidence of PW.1 during cross-examination that there were some repairs which were effected following the inventory. Apparently, the information as to the inventory and repair was not disclosed in the plaintiff's pleading.

There was a testimony of DW.1 that the defendant sought one month extension and hence left on 3/11/2017, which evidence related to the claim of the continued stay on the suit premise beyond 01/10/2017. The continued stay on the said premise is consistent with what is inferred in Exhibit P.3 and Exhibit P.4 herein admitted notwithstanding issues pertaining to their reliability which relate to missing pages and missing flow of communication in the relevant email printouts. It is also inferred in Exhibit P.5 which indicated the name of the defendant's officer who not only informed the plaintiff about the fire incident in the suit premise

on 21/02/2018 as testified by PW.1 but also reported the incident to the relevant authority.

The question is whether the defendant was in occupation of the premise when the fire incident occurred on 21/02/2018. I am mindful that the defendant had it that she vacated from the premise on 03/11/2017, had the inventory in 25/11/2017 as per DW.1 and 28/11/2017 as per PW.1, and the testimony by DW.1 in this respect was not challenged by the plaintiff during cross-examination. On the contrary, the afore going evidence was supported albeit in part by the testimony of PW.1 during cross-examination as already stated herein above.

The testimony by PW.1 of failure to regain possession of the premise notwithstanding the follow-up made is dented in my view by the pleading that the plaintiff refused to accept the notice of termination and the evidence in chief to such effect by PW.1 and in cross-examination to the effect that PW.1 was not aware when the defendant exactly vacated from the premise. The foregoing is again consistent with DW.1's testimony that there was no cooperation from the plaintiff for the handover to take place and hence his uncontroverted attempt to have

the matter settled in vain as exhibited by Exhibit P.8, and admitted by PW.1.

It is common place that the plaintiff was required to prove her allegations against the defendant on the balance of probabilities as she was the one who initiated the proceedings. I have in this respect had regard to the provision of section 110(1) of the Evidence Act, cap. 6 R.E 2019. Expounding on the above principle, the Court of Appeal in the case of **Jasson Samson Rweikiza v Novatus Rwechungura Nkwama**, Civil Appeal No. 305 of 2020, at pages 12-13 of its typed judgment had this to say and I hereby quote:

*It is a cherished principle of law that, generally, in civil proceedings, the burden of proof lies on the party who alleges anything in his favour. We are fortified in our view by the provisions of sections 110 and 111 of the Evidence Act. It is also common knowledge that in civil proceedings..... the party with legal burden bears the evidential burden and the standard in each case is on the balance of probabilities. See, for example **Godfrey Sayi v. Anna Siame as Legal Personal Representative of the late Marry Mndolwa**,*

*Civil Appeal No. 114 of 2012 (unreported). This is also provided for under section 3 (2) (b) of the Evidence Act. This means that the court will sustain such evidence which is more credible than the other on a particular fact to be proved. There is a considerable body of case law in this aspect and one case which stands out and which this Court has always sought inspiration is the statement by Lord Denning in **Miller v. Minister of Pensions** [1937] 2 All. ER 372*

In view of the above principle and the analysis of the evidence against the backdrop of the pleadings, I am satisfied that the plaintiff did not discharge her burden. There is no sufficient evidence that the defendant breached the lease agreement when she issued and served the plaintiff with the notice of termination of the lease in so far as the said notice was consistent with the clause 3(f) of the lease agreement (Exhibit P.1). Thus, the first issue is answered in the affirmative and thus against the plaintiff.

Similarly, the ancillary issues pertaining to the allegations of continued occupation of the premise by the defendant upto 15/09/2018 when the plaintiff gained access to the premise with the assistance of the local

government officer of the area where the premise is equally answered in the negative for reasons already stated above. The continued stay in the suit premise was in my view partly attributed to the plaintiff's refusal to accept the notice of termination issued.

As to the duration of the continued stay in the suit premise by the plaintiff from the date of the date the notice of termination became effective, I find that the same was upto 3/11/2022 pursuant to the evidence analysed above which also affirmed that there was an inventory in such respect on 25/11/2017 as per the evidence of DW.1 and 28/11/2017 as per the evidence of PW.1, and further that there was payment of USD 19,487 to the plaintiff as the rent for said period which was not disputed.

In the circumstances, the issue left for my determination at this juncture is to what reliefs are the parties entitled. Consequent to my finding herein above, I am satisfied that the reliefs sought by the plaintiff in the plaint, namely, claim for a sum of USD 213,346.37, vacant possession, interest on the principal amount, general damages, and punitive damages, cannot be granted as the allegations which would have justified granting of such reliefs or any were not established and as in

terms of the evidence the defendant had already given vacant possession.

In the results, and for reasons already stated herein above, the suit is wanting in merit. It is accordingly dismissed with costs.

It is so ordered.

Dated at Dar es Salaam this 20th day of July 2022.



B. S. Masoud
Judge

20/07/2022

