

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 20 OF 2022

SHEAR ILLUSIONS LIMITED PLAINTIFF

VERSUS

MLIMANI HOLDINGS LIMITED DEFENDANT

JUDGMENT

9th June 2023 & 17th July 2023

L. HEMED, J.

SHEAR ILLUSIONS LIMITED, the plaintiff in the instantaneous matter is a limited liability company incorporated in Tanzania Mainland, licensed to engage in cosmetics business. The defendant, **MLIMANI HOLDINGS LIMITED** is also a limited liability company managing and running Mlimani City Shopping Mall.

The facts pertaining to the dispute at hand is such that the Plaintiff and the Defendant were in a Tenant-Landlord relationship for a period of 15 good years at the premises known as Mlimani City Shopping Mall. Their relationship was reduced into written Lease Agreement renewable for a successive five (5) years term. The 1st two five years terms having gone

smoothly, the tenant, who is the plaintiff herein successfully obtained another five (5) years term lease agreement, commencing on 1st December, 2016 and expected to end on 30th November, 2021. This lease agreement is the subject of the present suit, covering the suit shop space in the Mall christened as Shop No.51A in which the plaintiff carried on her business.

Facts show that, the plaintiff was evicted from the suit premises by the defendant in December 2021 hence this suit. The plaintiff is thus praying for judgment and decree against the defendant as follows: -

- a) Declaration that the plaintiff was unlawfully evicted from shop number 51A.
- b) Declaration that the defendant unlawfully converted the plaintiff's properties from the suit premises.
- c) Payment of Tanzania Shillings Three Hundred Fifty Million (Tshs 350,000,000/=) being value of the confiscated properties.
- d) Interest thereon at the rate of 10% per annum from 17th December 2021 to the judgment date.

- e) Interest on the decretal amount at the rate of 7% from the date of judgment until full and final payment
- f) General damages as may be assessed by the court
- g) Costs of this suit; and
- h) Any other relief this honourable Court may deem fit and just to grant.

The defendant disputed the entire claims by filing the Written Statement of Defence and stated further that the plaintiff is in rent arrears. In determining the suit at hand, the following issues were framed: -

- i. Whether the Plaintiff was a lawful tenant on the suit premises.
- ii. Whether the Plaintiff was lawfully evicted from Shop 51A Mlimani City Shopping Mall.
- iii. Whether the Defendant had legal justification to withhold or confiscate the goods in stock in Shop 51A.
- iv. To what relief are the parties entitled.

At all the material time, **Mr. Emmanuel Msengezi**, learned advocate represented the Plaintiff while the defendant enjoyed the service of **Mr. Simon Mawalla**, learned advocate. The Plaintiff called four **(4)** witnesses,

SHEKHA HAMUD NASSER **(PW1)**, NOEL NICHOLAUS LEMA **(PW2)**, JOSEPHAT MUGETA IGNAS **(PW3)** and one SOPHIA MWANIWA CHAMZINGO **(PW4)**. The plaintiff tendered 10 exhibits. Exhibit P1 was the Standard Retail Lease Agreement of 01st December, 2016 to 30th November, 2021; Exhibit P2, the Renewal of the Lease for Shop No.51A Ref. SI/MHL/01/2021 of 23rd July, 2023; Exhibit P3, a letter from Mlimani Holdings Limited, ref: MHL21/SI/11/2021 dated 3rd November, 2021; Exhibit P4, a letter by Msengezi and Company Advocates, Ref: MCA/SIL/MHL/11/21/21/01 of 15th November, 2021 on Renewal of Lease for Shop No.51A and Payment of Outstanding Rent in respect of Shop No.61; Exhibit P5, reply from East African Law Chambers to Msengezi Advocates dated 29th November, 2021; Exhibit P6, an Order to open up by breaking, order of the DLHT-for Kinondoni in Land/Misc. Application No.134 of 2021; exhibit P7, hand over note by Force Focus Auction Mart Co. LTD dated 31st December, 2021; exhibit P8, list of properties/items in the Shop as of 1st November, 2021; exhibit P9, "OFISI YA SERIKALI YA MTAA WA CHUO KIKUU KUSHUHUDIA KUFUNGWA DUKA LAKO" dated 1st December, 2021; and exhibit P10 payment receipts of rent arrears and utilities.

The defendant paraded two witnesses, one **PASTORY LAURENT MROSSO (PW1)** and **SAMWEL DANIEL KILIMBA (DW2)**. Three exhibits were tendered, exhibit D1, certificate of authenticity and copies of data messages; exhibit D2, Ruling of the DLHT- Kinondoni in Misc. Application No.1278 of 2021 and exhibit D3, customer detailed ledger for 1st February, 2020 up to 31st December, 2021.

Evidence adduced by the plaintiff's case was as follows; PW1 who is the CEO and majority shareholder of the plaintiff told the Court that the Plaintiff deals with cosmetic business. She testified that SHEAR ILLUSSIONS LTD is the tenant of the defendant at Mlimani City Shopping Mall in Shop No.51A since November, 2006. It was renewed in November, 2011 and lasted up to November, 2016. The 3rd renewed lease was in November, 2016 and was to expire on 30th November, 2021. She told the court that, the instant dispute is concerned with the Lease Agreement of November, 2016 up to November, 2021 (exhibit P1).

PW1 asserted that clause 3 of the Lease Agreement provided for the right to renew the agreement by giving notice of three months prior to expiry date. PW1 adduced that since the Lease Agreement was to expire on 30th November 2021, she wrote a letter applying for renewal in July

2021 (exhibit "P2"). The defendant replied her letter 23 days before the expiry of the LEASE AGREEMENT (exhibit "P3"). The defendant notified her that they would not renew Lease Agreement.

It was the testimony of PW1 that, having received the said letter she consulted her advocate to respond to the letter on the refusal of the renewal (exhibit "P4"). He also protested against amount claimed as an outstanding amount. On 29th November, 2021, she was served with notice to vacate (exhibit P5). On 1st December, 2021, the Defendants closed the Shop by their padlock. According to PW1, she filed a case in the District Land and Housing Tribunal for Kinondoni, applying for the shop to be opened as all her properties/items/goods were in the Shop.

It was the testimony of PW1 that due to Corona pandemic her turnover dropped for 85% from Tshs 800,000,000/= up to Tshs. 170,000,000/=. She was of the view that, the defendant ought to have not evicted the plaintiff from the suit premises until the settlement of the dispute. She acknowledged that, the duty of the plaintiff was to pay monthly rent.

PW1 adduced that, the defendant closed the shop and removed the items/properties from the shop and closed it. When the shop was opened

by the Tribunal Broker – it was found that the properties were removed. Some of the confiscated items have already expired. PW1 told the court that, the plaintiff has been affected economically and the brand of the plaintiff has been damaged and its reputation has been lowered. She prayed the Court to order compensation for the goods that have been confiscated by the defendant. She also prayed to be reinstated to the suit premises.

Evidence of PW2, one **NOEL NICHOLAUS**, an expert in information System testified to have installed a system called *Dukani*, for purposes of managing sales of the plaintiff. He confirmed evidence adduced by PW1. **PW3** one **JOSEPHAT MUGETA IGNAS**, acting Executive Officer of Mtaa wa Chuo Kikuu, testified to have received complaints from the defendant that the plaintiff was in rent arrears of more than 30,000 USD. He witnessed the locking of the disputed shop and on 17/12/2021, he witnessed the shift of items/goods from the Shop. When cross examined by Mr. Mawala, learned advocate, he told the Court that having closed the shop, he issued notice to the Plaintiff (exhibit "P5"). **PW4** one **SOPHIA MWANIWA CHAMZINGO** an accountant and tax consultant of the plaintiff confirmed evidence of PW1 and told the court that the problem of

rent arrears commenced in 2020 due to Corona pandemic, which affected the plaintiff's business. She asserted that, the plaintiff was not paying rent as per invoice.

Testifying for the defendant, **DW1** one PASTORY LAURENT MROSSO, the general manager of the defendant since March, 2009, told the court that, the plaintiff was the tenant of the defendant up to 30th November, 2021, when her lease agreement expired. He stated that, according to clause No.3 in the Lease Agreement, the tenant was required to notify the Landlord on the intention to renew the Lease 3 months before the expiry of the Lease.

It was the testimony of DW1 that, the Plaintiff had applied for renewal of the Agreement but the owner was not willing to renew because the plaintiff was in rent arrears. He added that, the plaintiff's letter for renewal was responded before the expiry of the Lease, informing her that she was in rent arrears and that the defendant was not prepared to renew the Lease Agreement.

DW1 told the court that, having found that the plaintiff was reluctant to vacate the suit premises, he approached *Serikali ya mtaa* for assistance to evict her from the premises. DW1 added that, he also communicated

with PW1 through text messages requiring her to vacate the premises but she could not heed. He told the court that, the plaintiff had instituted a case in the District Land and Housing Tribunal for Kinondoni – looking for injunctive order which was refused (exhibit “D2”). DW2 one **SAMWEL DANIEL KILIMBA** an accountant of the defendant confirmed evidence of DW1 that the plaintiff is in rent arrears amounting to USD 30,000,000/= and utilities (water bills) of Tshs. 2,984,611.69/=.

Having gone through evidence adduced by both parties, it is apt to turn to determine the issues that were framed at the commencement of the hearing. In determining the matter at hand, I will be guided by the principle cherished in section 110(1) & (2) of the Evidence Act, [Cap 6 R.E 2023] which provides thus: -

*"110(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."*

The first issue was on whether the Plaintiff was a lawful tenant on the suit premises. From the testimony on record, it is without doubts that the last Lease Agreement between the Plaintiff and the Defendant (exhibit “P1”) was for five (5) years from 1st day of December, 2016 to 30th day of

November, 2021. The parties never renewed the Lease Agreement after its expiry on 30th day of November, 2021. In her evidence, PW1 was of the view that the plaintiff was entitled for renewal of lease agreement pursuant to clause 3 of exhibit P-1 (the Lease Agreement) because the defendant who is the lessor, did not notify the plaintiff in writing as to whether the lessor was willing to renew the contract, three months prior to the termination of the initial period. The plaintiff has also relied much on clause 20.5 of the Lease Agreement (exhibit P1) that since there was a pending case in the District Land and Housing Tribunal, she was entitled to remain in occupation of the premises pending settlement of any dispute.

I am aware of the decision of the Court of Appeal of Tanzania in **National Bank of Commerce Limited vs Mapele Enterprises Company Limited and 2 others**, Civil Appeal No. 381 of 2019, about sanctity of the contract. In the said decision, it was held that:

"sanctity of contract is established upon adherence to the cardinal principle of the law of contract is that parties are bound by the terms of the agreement they freely entered into..."

The parties to this matter are thus bound by the terms of the Lease Agreement. I have keenly revisited clauses 3 and 20.5 of exhibit P1 to find

out if they automatically extended the Lease Agreement. In the first place, I realized that clause 3 vests the option to renew the agreement at the sole discretion of the lessor. It provides thus: -

"...The option to renew this agreement after the initial period will be at the sole discretion of the lessor..."

In the present matter, the defendant opted not to renew the Agreement. Clause 20.5 envisages that in event the lessor cancels the agreement and the lessee disputes the right to cancel and remains in occupation of the premises, the lessee shall, pending settlement of any dispute, continue to pay. I have examined clause 20.5 and found that it is a bound payment of rent when the tenant continue to occupy the demised premises pending settlement of pending dispute. It does not provide for automatic extension of already expired Agreement. In the instant case, the defendant did not cancel the Lease Agreement, rather it had come to its end. To answer the 1st issue, it is thus an unequivocal fact that the tenant-landlord relationship between the plaintiff and the defendant ended upon the expiry of the Lease Agreement on the 30th November, 2021. In other words, the plaintiff was the lawfully tenant of the defendant up to 30th November, 2021.

The 2nd issue was on whether the Plaintiff was lawfully evicted from Shop No.51A Mlimani City Shopping Mall. Evidence on record shows that the plaintiff was evicted from the suit premises in December 2021. The eviction was carried out after the expiry of the Lease Agreement. The Plaintiff was served with the Notice to vacate from the suit premises through exhibits "P3" and "P5". At the time of eviction, the plaintiff was no longer tenant in the suit premises. Therefore, to answer the 2nd issue the plaintiff was lawfully evicted from the suit premises.

The 3rd issue was on whether the Defendant had legal justification to withhold or confiscate the goods in stock in Shop No.51A Mlimani City Shopping Mall. Evidence adduced by PW2, DW1 and DW2 show that the defendants did not confiscate goods from the suit premises. They only removed them to another room within Mlimani City Shopping Mall so that to enable another tenant to occupy the suit shop. According to evidence on record, it was so done following the plaintiff's failure to heed the notice to remove the items in question. There is no evidence on record that the plaintiff demanded the properties from the defendant and or the defendant refused to hand over the same to the plaintiff. The fact that the defendant's

evidence is to the effect that the alleged properties are under the custody of the defendant, the plaintiff is entitled to collect them if she so wishes.

The last issue was on reliefs parties are entitled to. The plaintiff had prayed for the following issues: -

- i) Declaration that the plaintiff was unlawfully evicted from shop number 51A.
- j) Declaration that the defendant unlawfully converted the plaintiff's properties from the suit premises.
- k) Payment of Tanzania Shillings Three Hundred Fifty Million (Tshs 350,000,000/=) being value of the confiscated properties.
- l) Interest thereon at the rate of 10% per annum from 17th December 2021 to the judgment date.
- m) Interest on the decretal amount at the rate of 7% from the date of judgment until full and final payment.
- n) General damages as may be assessed by the court.
- o) Costs of this suit; and
- p) Any other relief this honourable Court may deem fit and just to grant.

Section 110 of the Evidence Act [Cap 6 RE 2019], requires that the one who wishes for the court to decide in his favour must prove the alleged facts and in **Hemed Said vs Mohamed Mbilu** [1984] TLR 113, the court insisted that the one whose evidence is heavier than the other is the one who must win. In the instantaneous suit, the plaintiff has failed to prove her claims as her evidence on record is not heavier than that adduced by the defendant. The plaintiff's case must fail in the circumstance! In the upshot, the entire suit is dismissed with costs.

DATED at **DAR ES SALAAM** this 17th July, 2023.




L. HEMED
JUDGE