

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

AT DAR ES SALAAM

LAND APPEAL NO. 302 OF 2023

DR PATRICK EMILY KAZINJA APPELLANT

VERSUS

ISSA TWAHA MOHAMED.....RESPONDENT

JUDGEMENT

31st August, 2023 & 19th October 2023

L.HEMED. J

The appellant, **DR. PATRICK EMILY KAZINJA** and the Respondent, **ISSA TWAHA MOHAMED** have the relationship of a 'tenant' and 'landlord' respectively. The suit property which is subject of this matter is on Plot No. MMJ-459, Mjimwema, Kigamboni Dar es Salaam. The Appellant is the one who instituted the suit at the District Land and Housing Tribunal for Kigamboni which was registered as Land Application No.132 of 2022.



The background pertaining to the instant matter is such that, on 08th February 2017 the parties herein had executed a lease agreement of a business frame (Chumba cha Biashara) where the appellant was to use it as a laboratory. On 10th February 2022, the parties herein entered into another lease agreement of five (5) years term, for the main house which the appellant has designated it as a dispensary.

Misunderstanding emerged between the parties as to whether the Lease Agreement executed on 10th February 2022 included the business frame as well. Since no consensus *ad idem* could be reached, the appellant opted to institute a suit in the District Land and Housing Tribunal for Kigamboni which was registered as Land Application No.132/2022. The claim before the trial Tribunal was *inter alia* for breach of lease agreement.

Having deliberated on the matter before it, the trial Tribunal found in favour of the Respondent herein. It interpreted the Lease Agreement dated 10th February 2022 not to include the business frame. The Appellant was aggrieved by the said decision, hence the instant appeal on the following grounds:

"1. *That, trial Tribunal grossly erred in law and in fact by failure to consider and interpret exhibit P2 whose terms was clear that*



*the disputed house (fremu za biashara) forms part and parcel of leased land **MMJ 459 – DAR ES SALAAM.***

2. The trial Tribunal erred in law and in fact by entering judgment in favour of the Respondent based on comparison of Exhibit P1 and P2 without taking into consideration that upon after the parties executed the contract under exhibit P2, Exhibit P1 was no longer in existence.

3. That trial Tribunal without any good reason erred in law and fact by failure to consider evidential and testimony adduced by the Appellant.

4. That the Trial Tribunal without any reasonable cause erred in law and in fact by failure to properly evaluate evidence adduced before it as such it had ended in an unjustifiable judgment.


5. That the tribunal's judgement never considered issues raised before it as such it ended to decide matter not in dispute simply the grievances between the parties was one of breach of contract.



6. Those trial tribunal's findings in the judgment miscarriage justice to the appellant simply the judgement does not show at any point if the appellant ever submitted her respective final submission which to the part of the appellant was certain and influential to move the Tribunal to rule in favour of the applicant if the same would not consideration."

The appeal was argued by way of written submissions. **Mr. Akiza Rugemarila**, advocate represent the appellant, while the respondent enjoyed the legal service of **Mr. Nimrod Msemwa**, learned advocate. The submissions were promptly filed as per the scheduling order of the court.

In supporting the appeal, **Mr. Rugemarila** asserted that the trial tribunal failed to consider Exhibit P2, as the contract of the suit premises including the frames in dispute, and that there is no exclusion clause for the business frames. He was of the view that parties are bound by the terms of the contact. To support his arguments he referred to the decision of Court of Appeal of Tanzania in **Lulu Victor Kayombo vs. Oceanic Bay Limited**, Civil Appeal No 22 &155 of 2020, and **Beralia Karangirangi vs Asteria Nyalamba**, Civil Appeal No 237 of 2017, Court of Appeal of Tanzania.



In reply thereto, **Mr. Msemwa** contended that the contract of 10th February 2022 did include the frames in dispute. He insisted that even during trial the appellant did not discharge his duty to prove that the suit frames were part and parcel of the rented house.

I have considered the record of the trial Tribunal and found that the matter was on the interpretation of the Lease Agreement (exhibit P2) as to whether it included the business frames as well. I have also noted that, even the 1st issue was framed for purposes of making such interpretation. It readth:- *"1. Je fremu bishaniwa ni sehemu ya mkataba upangaji kati ya wadaawa."*

I have examined exhibit P2, the Lease Agreement of 10th February 2022 and found the following words in Swahili language;

"KWAKUWA MPANGISHAJI ni mmiliki halali wa nyumba iliyopo mtaa wa MJIMWEMA KIGAMBONI(MMJ495) DAR ES SALAAM, na kwa hiari yake amekubali kumpangisha mpangaji nyumba hii kwa ajili ya biashara." (underlines are added for emphasis).

According to the above wording, the Respondent herein leased a house which is on a piece of land known as MMJ495 to the Appellant herein. The words '*Nyumba iliyopo*' and '*nyumba hii*' used in the Lease



Agreement refers to a specific 'building' on MMJ495. The Black's Law Dictionary, 8th Edn defines a house to be a building. It is thus possible of having more than one building in a specified piece of land. In the instant case, the trial Tribunal visited the *locus in quo* and discovered that in MMJ495 there are; the main house and the business frames constructed in the fore part of the main house/building separate from it. The said business frame has six (6) rooms.

It is my firm view that if at all the Respondent had intended to lease all the buildings in MMJ495 to the appellant, then, the following words would have been used in the Lease Agreement (exhibit P2), '***nyumba zilizopo***' instead of '***nyumba iliyopo***' and '***nyumba hizi***' instead of '***nyumba hii***'. The use of the words '***nyumba iliyopo***' and '***nyumba hii***' had the meaning of excluding the other buildings in the piece of land known as MMJ495.

I have also noted from evidence adduced by the advocate who witnessed the Lease Agreement (exhibit P2), one Ms.Maurine Mmary (SU2). In her testimony, it was asserted that the Lease Agreement executed on 10th February 2022 was intended for a specific building, the main house which is currently used by the Appellant to run a dispensary services. From the foregoing, I find that the trial chairperson was right



in his decision to find that exhibit P2 did not include the business frame. The 1st ground of appeal has no merits, it deserves to fail.

On the second ground of appeal, the counsel for the appellant amplified that the trial tribunal entered judgement in favour of the respondent by comparing Exhibit P1 and P2. In his opinion, the two exhibits were two different documents. He insisted that upon signing Exhibit P2, the Exhibit P1 ceased to exist.

In response thereto, the respondent's counsel argued that the trial tribunal did not make comparison between exhibit P1 and P2 as suggested by the appellant, rather used the said exhibits to show that in exhibit P1 the appellant rented two business frames at the same plot MMJ 459 which did not include the main house. He was of the view that there was no justification for the Appellant to claim that exhibit P2 included the six business frames in the foreshore of the main house.

In assessing the merits of the 2nd ground of appeal, I had to go through the proceedings and the decision of the trial Tribunal. I realized that exhibits P1 and P2 were tendered by the Appellant and admitted into evidence. Upon admission, it becomes the duty of the court to evaluate the value of such evidence. This was also insisted by the Court



of Appeal of Tanzania in **Paulina Samson Ndawavya vs. Theresia Thomas Madaha**, Civil Appeal No. 45 of 2017 (unreported), that:-

"it is a duty of the trial court to evaluate evidence of each witness and make findings on the issues."

I have noticed from the judgment of the trial tribunal that what the chairperson did was to analyse and evaluate exhibits P1 and P2. In that regard, I find no merits in the 2nd ground of appeal as what was done by the trial Chairperson was to discharge his duty to evidence on record.

Regarding the third and fourth grounds of appeal, it was stated that the trial tribunal failed to evaluate, analyse, record and consider all evidence and testimony adduced by the appellant. He further argued that evidence of the appellant has not been reflected in the judgement, which in his view is a fatal omission. He fortified his argument by the decision of the Court of Appeal of Tanzania in **Fred John vs Republic**, Criminal Appeal No 17 of 2018 which envisages that failure to consider the evidence is fatal to the trial or proceedings.

In response to the arguments regarding the third and fourth grounds of appeal, the counsel for the respondent was of the view that the appellant had not clarified what the chairperson did not evaluate,



analyse, record and consider in his judgment. He also insisted that the trial Tribunal considered all the three issues which were framed at the commencement of hearing for the court to find that the two grounds of appeal have no merits too.

I am not going to dwell much on the 3rd and 4th grounds of Appeal as the answer to the said grounds is straightforward. As aforesaid, the matter before the trial Tribunal was on breach of Lease Agreement dated 10th February 2022. The trial Tribunal was invited to interpret if the said lease agreement included the business frames. I have seen evidence adduced by the Appellant being summarised at page 5 and 6 of the typed judgment of the trial Tribunal where he tendered two documents, exhibits P1 and P2, both being lease agreements.

The trial Tribunal recorded the testimony of the appellant of what he said about when and how the leases agreement were executed. The trial Tribunal received exhibits P1 and P2 and made the requisite analysis. In that regard I find no merits in the 3rd and 4th grounds of appeal.

On the fifth ground the counsel for appellant alleged that the trial Tribunal failed to determine the suit between the parties in accordance with the raised issues. He placed reliance on the decision of the Court of



Appeal of Tanzania in **Said Mohamed Said vs Muhisin Amr & Muharami Juma**, Civil Appeal No 110 of 2020, where it was stated that court should determine the matter according to the issues. In reply, thereto, the counsel for the respondent contended that all the framed issues were determined and the trial Tribunal answered all of them at page 7 of the typed judgement.

The rival arguments in regard to the 5th ground of appeal forced me to extensively peruse the record and judgment of the trial Tribunal to find out the issues framed and whether they were property dealt with. The proceeding of the trial Tribunal displays that on 7.12.2022, three issues were framed. The said issues are reproduced hereunder verbatim, thus:-

- " 1. Je fremu bishaniwa ni sehemu ya mkataba wa upangishaji kati ya wadaawaa.*
- 2. Kutegemeana na hoja ya kwanza ya mkataba upangishaji umevunjwa au haujavunjwa.*
- 3. Nafuu zipi wadaawa wanastahili kupatiwa."*

I have also read the judgment of the trial Tribunal and found that the above issues were reproduced at page 4 of the typed judgment. All of the three issues have been answered in the judgment of the Tribunal.



For instance, in regard to the 1st issue the trial Tribunal found that the business frame were not included in the Lease Agreement dated 10th February 2022. The 2nd issue was also answered that there was no breach of the Lease Agreement in dispute. The trial Tribunal also found that the Appellant had failed to prove his claims hence found the proper remedy to be dismissal. I am thus of the firm view that the 5th ground of Appeal has no merits at all.

With regard to the 6th ground of appeal, the counsel for the appellant argued that the trial Tribunal failed to consider the appellant's final submission in its judgement. He failed to understand as to why the judgment was in favour of the respondent who did not file final submission.

Responding thereto, the counsel for the respondent stated that filing final submission is an option. He fortified his argument by citing the decision of the Court of Appeal of Tanzania in **Hadija Ally vs Geogre Masunga Msingi**, Civil Appeal No. 384 of 2019, where it was held that written submission cannot be used as a forum for raising new complaints.

I am at one with the learned counsel for the Respondent that filing final submissions is an option. Failure to file final submissions does not



have any adverse effect to a party who fails to comply. Final submissions are intended to provide a persuasive guidance for the court to decide in favour of a party who filed it. Failure to consider the final submissions does not make the judgment defective and invalid. I am holding so because the contents of a valid judgment are provided under Order XX Rule 4 of the Civil Procedure Code, [Cap 33 R.E 2019], thus:-

*"A judgment shall contain a **concise statement of the case**, the **points for determination**, the **decision thereon** and the **reasons for such decision**."(Emphasis added)*

From the above provision, there is no requirement for considering final submissions in the Judgment. I find no merits in the 5th ground of appeal.

In the final analysis, all grounds of appeal have been found to have no merits. I hereby dismiss the entire appeal with costs. It is so ordered

DATED at DAR ES SALAAM this 19th October 2023.




L. HEMED

JUDGE