

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

LAND APPEAL NO. 27059 OF 2023

(Originating from Application No. 25 of 2012 in the District Land and Housing Tribunal for Ilala delivered by Hon. A.R Kirumbi on 23rd October, 2023.)

MWAJUMA ABDULRAHMAN JONGO..... APPELLANT

VERSUS

NYUMBA MUSA.....RESPONDENT

JUDGMENT

Date of last Order: 04/3/2024

Date of Ruling: 23/4/2024

A. MSAFIRI, J.

This dispute has taken many years now as according to the court records, it was initially instituted by the now appellant Mwajuma Abdulrahman Jongo in the District Land and Housing Tribunal of Ilala District (herein the Tribunal) in 30/01/2012. It was filed against Nyumba Musa (who is now the respondent) then he was the 1st respondent, and other two respondents who are not part of this appeal i.e. Mbinga Auction Mart and Pili Saidi Abdalla.

In her claims before the Tribunal, the appellant claimed that since 2009 she was residing in the disputed house described as Plot No. 33, Jangwani Street, Kariakoo, Dar es Salaam as tenant and she recognized the 1st

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respondent (who is now the respondent) as the landlord. That later she came to know that the appellant was not the owner of the disputed house but the owner is Pili Saidi Abdalla (who was the 3rd respondent). That following that knowledge, the appellant entered a new six months tenancy contract with the said Pili Saidi Abdalla, the act which prompted the respondent to engage the service of Mbinga Auction Mart and forcefully evicted her from the disputed house. She claimed further that the eviction caused a lot of damages on her properties.

She prayed for the Tribunal's declaration orders that the respondent is not the lawful owner of the disputed house and payment of compensation for her damaged and lost properties.

The three respondents by then filed their joint written statement of defence and the now respondent filed a counterclaim. The application was heard and decided in favour of the respondent where in the counterclaim, the appellant was ordered to pay the rental arrears. The appellant was dissatisfied and she filed an appeal to this court which was heard before Hon. Minja.K.J, PRM with extended jurisdiction as Extended Land Appeal No. 165 of 2020. The appeal was allowed and the proceedings and judgment of the trial Tribunal were quashed and set aside and the order of retrial was issued. The case file was remitted for retrial and it was heard before Hon. Kirumbi. On the date set for hearing, the appellant was

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absent hence the application was dismissed for want of prosecution and the Tribunal entered ex parte order whereby the counter claim by the respondent was heard on one side.

The Tribunal decided the case in favour of the respondent whereby the appellant was ordered to pay the rental arrears accumulated from 11/02/2010 to 08/02/2022. The appellant was aggrieved and has now appealed in this court advancing three ground of appeal as follows;

- 1. That the trial Tribunal grossly misdirected itself in fact and in law on the question of burden of proof and thus entered erroneous and unjust decision.*
- 2. That the trial Tribunal erred in law and fact for entertaining the matter with serious irregularities and illegalities.*
- 3. That the trial Tribunal grossly misdirected itself in fact and in law for its failure to analyze evidence correctly and thus entered erroneous and unjust decision.*

The appeal was heard by way of written submissions upon the request of the parties and leave of the court. The appellant was represented by Mr. M.R Kiondo, learned advocate who drew and filed the submissions in chief in support of the appeal.

In the submissions, the counsel for the appellant prayed to merge the 1st and 2nd grounds of appeal and argued them jointly. He submitted that it is trite law that in civil cases, the burden of proof lies on the person who

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alleges. That at the trial, the respondent was claiming for payment of rental arrears and that the appellant has refused to give vacant possession of the disputed house and that the appellant was later evicted from the disputed house in 08/02/2022.

Mr Kiondo argued that the appellant has failed to discharge the burden of proof as his exhibits P1, lease agreement and P2, the rental agreement (Makubaliano ya Kodi) do not prove that the lease continued up to 08/02/2022 and thus the respondent's claims of TZS 72,000,000/= of accumulated rent arrears was not proved. He added that the respondent brought no document to prove that he is the rightful owner of the disputed house.

Mr Kiondo submitted further that the respondent failed to prove that after having been evicted on 10/10/2011, the appellant returned to stay in the disputed house until 08/02/2022 as he claims. That the appellant failed to state even the names of the people who evicted the appellant on 08/02/2022. To bolster his points, the counsel cited the case of **Hemedi Saidi vs. Mohamed Mbilu** (1984) TLR 113.

In reply on these grounds, Ms Zarina Salama Nassor, learned advocate was the one who drew and filed the reply submissions. On the 1st and 3rd grounds, she submitted that the respondent well discharged his burden

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of proof and a number of witnesses does not matter as what matters is the weight of evidence.

That the respondent testified and proved that he was the landlord and lawful owner of the disputed house and the proof of ownership was a question not to be determined at the trial Tribunal as it was not the part of the counterclaim.

On the aspect of exhibits P1, a lease agreement and exhibit P2, the counsel for the respondent argued that the exhibits proved that there was a landlord and tenant relationship between the disputing parties. That the rent arrears of TZS 72,000,000/= arose from 11/02/2010 to 08/02/2022 which the appellant never paid.

Ms Nassor argued further that in her application, the appellant averred that she was evicted by the respondent and re-entered the house on 06/10/2011 hence this proves that she continued to stay in the disputed house without paying rent. That these claims are also reflected in the appellant's filed written statement of defence on counterclaim.

She said that it was not possible for the respondent to produce another lease agreement between him and the appellant from 11/02/2010 to 08/02/2022 as the appellant never paid rent to the respondent. She

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insisted that the respondent proved his case on balance of probability and prayed for the dismissal of the appeal with costs.

Having gone through the submissions by both parties and the trial Tribunal records, the issue for determination is whether the 1st and 3rd grounds of appeal are meritorious. It is the contention of the appellant through her counsel that the respondent failed to prove his case during the trial first, that he was the lawful owner of the disputed house and second, that the appellant returned to stay in the suit house after he was evicted on 10/10/2011.

I agree with the submissions of the counsel for the respondent that the issue of the ownership of the disputed house was not the issue for determination before the trial Tribunal. The matter before the trial Tribunal was a counterclaim filed by the respondent whereby he was claiming that he entered into a lease agreement as a landlord and the appellant as a tenant. He claimed further that, after expiry of a contractual period on 08/2/2010, the appellant went on to hold the leased room illegally and without payment of rent. The respondent was seeking for payment of rent arrears which totaled TZS 72,000,000/=.

Before the trial, three issues were framed, first was; whether there was a lease agreement between the applicant and the respondent, two; if the

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first issue is answered in affirmative, whether the applicant owes the respondent the rent arrears amount to TZS 72,000,000/=, and third; the reliefs which the parties are entitled.

From these issues, the trial Tribunal heard the evidence and determine the application. During the trial, the applicant gave evidence proving that he entered the lease agreement from 2009-2010 with the then respondent who was a tenant. From the evidence adduced during the trial, the respondent managed to prove on a counterclaim that there was landlord/tenant relationship between him and the respondent whereby the now appellant leased the house of the respondent for one year term from 2009. The respondent produced exhibits P1 and P2, the lease agreements. It was from this evidence that the trial Tribunal answered the first issue in affirmative that there was a lease agreement between the parties.

The issue of the ownership was never before the Tribunal for determination on counterclaim. The appellant had filed a main application disputing the ownership of the disputed house by the respondent however she failed to attend her case hence it was dismissed. What the appellant is doing is trying to resurrect in this appeal, her main case which was dismissed for non-appearance. The appellant is raising a new issue in appeal which was not subject for determination during the trial. *Adde*

Mr Kiondo has also argued that the appellant has failed to discharge the burden of proof as his exhibits P1, lease agreement and P2, the rental agreement (Makubaliano ya Kodi) do not prove that the lease continued up to 08/02/2022 and thus the respondent's claims of TZS 72,000,000/= of accumulated rent arrears was not proved.

Indeed, exhibits P1 and P2 shows that there was one year term of lease whereby the appellant took possession of the rented room in 25/01/2009 and the term therefore expired in 2010. However the respondent testified that after the term expired, the appellant refused to renew the term with the respondent nor vacate the house as she claims that the respondent was not the lawful owner of the disputed house. The respondent claimed that he had to hire the auctioneers from Mbinga Auction Mart to evict the appellant. That despite the eviction, the appellant forcefully moved back into the disputed house in 2011.

I find that the argument by the appellant through his counsel does not hold water since the appellant herself has admitted to be the tenant of the respondent since 2009 and that by that time she recognized the respondent as the landlord. That, later she was informed that the respondent was not the owner of the house hence in 2011 she entered a new tenancy contract with one Pili Said Abdallah who was the *Attor*

administrator of the estate of Abdulrahman Seif Mgereka who was the real owner of the disputed house.

In her claim, the appellant admitted that in 2011, the plaintiff engaged Mbinga Auction Mart to evict her from the disputed house. Therefore this shows that the appellant was indeed evicted from the disputed house twice, the first time in 2011 and the second time in 2022.

I agree with the findings of the trial Tribunal that in the circumstances, it was not possible for the appellant to renew the term of lease agreement with the respondent as the former refused to recognize the latter as the lawful owner of the house. The appellant also refused to pay any rent sum to the respondent and as a result she went on living in the disputed house without paying any amount to the respondent.

Section 82(1) of the Land Act, Cap 113 R.E 2019 provides thus;

*"Where a lessee remains in possession of land without the consent of the lessor after the lease has been terminated or the term of the lease has expired, **all the obligations of the lessee under the lease continue in force until such time as the lessee ceases to be in possession of the land**" (emphasis mine).*


From the above provision, since the appellant refused to vacate the premises after the term of the lease has expired on 11/02/2010, all her

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obligations including rental payments continued to be in force until 08/02/2022 when she was evicted for the second time.

Basing on that evidence, the trial Tribunal determined the second issue in affirmative that the respondent was entitled to the payment of rental arrears from when the lease has expired to 2022 when the appellant was evicted from the disputed house. I find no reason to differ with the finding of the trial Tribunal and therefore, the 1st and 3rd grounds of appeal have no merit.

On the second ground of appeal, the counsel for the appellant Mr. Kiondo submitted that the trial Tribunal's judgment was tainted with illegalities and irregularities. That on the records, the proceedings are silent on which assessors attended on 12/9/2023, which mean that the Chairperson presided without assessors. He said that this is fatal irregularity which contravenes the provisions of Regulations 19(2) of the Land Disputes Courts (The District Land and Housing Tribunal Regulations, 2003).

In response, Ms Nassor for the respondent denied the claims and averred that the case was scheduled for hearing for two days which was on 11/9/2023 and 12/9/2023 and two assessors attended on both days who are Mr. Mwakalasya and Ms. Jokha. 

I have read carefully the records of the trial Tribunal. Indeed it shows that on 11/9/2023, the issues were framed and the hearing took off on 12/9/2023. On both days the assessors were in attendance. Admittedly on 12/9/2023 on the part of the Coram the assessors were not named, but this does not mean that the record is silent on attendance /presence of assessors in court on that date. The record of 12/9/2023 shows that the assessors were in attendance and they even got chance to ask the witness some questions for clarification. I find the fact that the Coram part is blank on the names of the assessors to be not fatal as the record shows that they attended and even ask questions to the witness. I also find this ground of appeal to have no merit.


The counsel for the appellant also submitted on the appellant's right to be heard. He averred that the appellant was denied of her right to be heard whereas on 11/9/2023, the counsel for the appellant appeared and the matter was set on next day for hearing i. e. 12/9/2023. That on that date, 12/9/2023, the Tribunal proceeded ex parte against the appellant and that was contrary to the cardinal principle of natural justice.

In response, Ms Nassor argued that neither the appellant nor her advocate appeared in Tribunal when the matter was scheduled for hearing on 11/9/2023 and 12/9/2023. That there was no any *Alles*

explanation for their non-appearance. That the appellant was accorded the right to be heard but she failed to adhere to it.

The record of the Tribunal shows that on 09/5/2023 before the Tribunal, the matter was fixed for hearing on two consecutive days i.e. on 10-11/7/2023. On that day, neither the applicant nor her advocate were present in court. On 10/7/2023, the parties appeared in court for hearing. Mr. Kiondo stated that his witness was sick and hence was unable to proceed on that date with the hearing. He prayed for adjournment and in resistance of the respondent, the hearing of the matter was adjourned to 11-12/9/2023.

Again on the date fixed, the appellant was not in attendance in court. There was no reason of her absence. The counsel one Hassan Rasul was in attendance as the counsel who appeared for the appellant. Surprisingly the said counsel told the Tribunal that he had no communication with the appellant who has not entered appearance for hearing. Mr. Rasul left the matter in the hands of the Tribunal. I will reproduce Mr Rasul's words for purpose of understanding;

" Mheshimiwa mdai alikuwa anaumwa na bahati mbaya tumepoteza mawasiliano nae, na pia hajafika Barazani, kwa hiyo tunaliachia Baraza liamue" 

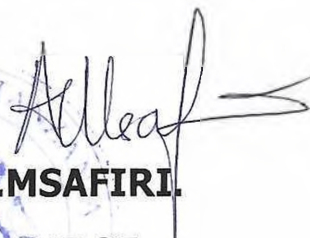
After that the Tribunal decided to proceed with the matter *ex parte* on counterclaim after dismissal of the main application.

Having read the circumstances which led the Tribunal to proceed in absence of the appellant, I am satisfied that the appellant on her own doing denied herself her right to be heard by failing to appear before the Tribunal while knowing that it was her duty to do so. The appellant's counsel could not inform the where about of the appellant and ended leaving the matter for the Tribunal to decide.

For the analysis of the evidence on record, I am of the strong belief that the Tribunal was justified in ordering the matter to proceed in absence of the appellant in the counter claim and dismissal of the main application.

I find no reason to fault the decision of the trial Tribunal. I find the appeal lacks merit and it is hereby dismissed in its entirety with costs.

It is so ordered.


A.MSAFIRI.
JUDGE
23/4/2024

