IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

(CORAM: MUGASHA, J.A., KOROSSO, J.A., And MWANDAMBO, J.A.)

CIVIL APPEAL NO. 242 OF 2018

PRINCESS NADIA (1998) LTD .... APPELLANT

VERSUS

1. **REMENCY SHIKUSIRY TARIMO**
2. **DIRECTOR, EUKENFORDE EDUCATION INSTITUTE**
3. **THE MANAGER YONO AUCTION MART**

..... RESPONDENTS

(Appeal from the judgment and decree of the High Court of Tanzania at Tanga)

(Rugazia, J.)

dated the 24th day of July, 2015
in
Land Case No. 1 of 2007

JUDGMENT OF THE COURT

31st May & 9th June, 2021

MWANDAMBO, J.A.:

M/s Princess Nadia (1998) Ltd, the appellant, sued the respondents before the High Court sitting at Tanga for several reliefs. The appellant's cause of action was founded on the alleged unlawful eviction from the premises known as Lawley Building Block BKB III Central Area, Tanga Municipality causing damage to her properties whereby the appellant claimed damages under several heads. The High Court was not satisfied that the appellant had discharged her burden of

proof warranting judgment in her favour. It dismissed the suit in its entirety and hence the instant appeal.

What prompted the suit before the High Court is not in dispute. It is to the following effect. On 1st January 2000 the appellant accepted an offer from the Tanzania Sisal Board for the lease of ground floor of its offices at Lawley Building along Market Street, Tanga Municipality for a period of 15 years commencing on 01/01/2000, for the purpose of running a bakery and confectionery business. Since no formal lease agreement was executed, the accepted offer constituted the agreement between the parties. Pursuant to the said agreement, the appellant and the landlord agreed on the renovation of the demised premises by the appellant tenant and recoup at 60% of the costs from the monthly rent per annum.

In the year 2004, the demised premises changed ownership by way of sale to Remency Shikusiry Tarimo, the first respondent and director of the second respondent. The appellant appears to have been made aware of the new tenant with whom she could negotiate a fresh tenancy. Nevertheless, she did not do so because she refused to recognise the new owner neither did, she pay rent to him. As remarked by the learned trial Judge, the relationship turned out to be frosty

reaching its climax on 31/10/2006 with the eviction of the appellant from the premises through the third respondent throwing her properties outside the building. The appellant protested the respondents' acts in the suit which the appellant instituted against the respondents claiming that the eviction was unlawful because all along she had been paying rent to the previous owner. She further alleged that the unlawful eviction caused damage to her business assets as well as loss of business.

In their defence, the respondents contended that the appellant was neither a tenant in the premises nor did she pay any rent for the whole period she occupied such premises. As such, she was not entitled to any notice prior to the eviction. The record does not indicate that the third respondent appeared and filed any defence. The High Court framed five issues for the determination of the suit namely: - **one**, whether the appellant had tenancy agreement with the Tanzania Sisal Board; **two,** whether that tenancy binds the first and second defendants; **three**, whether the defendants did unlawfully enter and evict the plaintiff; **four**, whether the plaintiff suffered any loss of property and business as a result; and, **five** what reliefs.

From the evidence, there was no dispute that there was a tenancy agreement between the appellant and the Tanzania Sisal Board. However, that agreement failed to meet the test of admissibility in evidence pursuant to section 9 of the Registration of Documents Act, [Cap 117 R.E. 2002]. It became apparent that there was no evidence of its registration of the lease for more than five years period which was compulsorily registrable with the Registrar of Documents as required by section 8 (1) (h) of Cap. 117. Despite the non-admission, the learned trial Judge held that even assuming the agreement was admissible in evidence, it did not bind the new owner of the premises. Having so held, the trial court found that the appellant was not a legal tenant of the first and second respondents and for that reason, she was not entitled to any notice prior to eviction. That aside, it held that there was evidence through exhibit P6 indicating that the appellant was given notice but refused to heed to it and hence the forceful eviction. With regard to reliefs, whilst noting that there was evidence of damage to the appellant's properties as a result of the eviction, the trial Judge refused to grant any. This is so since, one; the grant of TZS 18,315,000.00 as special damages could only be considered against the first and second respondents' claim for the lost opportunity to open a nursery school in the premises unlawfully occupied by the appellant; two, other claims for

damages could not be awarded to an illegal tenant. In the light the foregoing, the trial court dismissed the appellant's suit with costs.

Aggrieved, the appellant instituted the instant appeal predicated on four grounds of appeal. However, Mr. Switbert Rwegasira, learned advocate representing the appellant abandoned ground four which faulted the trial Judge for pronouncing judgment in a suit in which the second and third respondents did not testify in defence. A little later in the course of his submissions, the learned advocate felt difficulties in prosecuting grounds two and three. Worth for what they were, the two grounds were intended to impress the Court that the appellant was a legal tenant of the Tanzania Sisal Board and so she was entitled to a notice before eviction. We granted leave and the said grounds were marked abandoned.

Having abandoned the three grounds, Mr. Rwegasira addressed us on the remaining ground contending that the trial Judge grossly erred in both law and fact for his failure to award damages to the appellant despite his finding that the appellant's properties were unlawfully damaged by the respondents. His arguments on this ground were proceeded by a preliminary issue on which he sought and was granted

leave to address the Court in relation to the lack of endorsements on the exhibits tendered during the trial.

Given the floor, the learned advocate contended that the exhibits tendered during the trial were not endorsed contrary to the dictates of Order XIII rule 4(1) of the Civil Procedure Code [Cap. 33 R.E. 2002] (the CPC). He impressed upon the Court to find that the omission in the proceedings resulting in the appeal was fatal. The learned advocate argued that there was a complete omission to endorse the exhibits unlike in **Standard Chartered Bank Tanzania Limited v. National Oil Tanzania Limited & Another**, Civil Appeal No. 98 of 2008 (unreported), where the Court found lack of endorsement in one cheque leaf admitted as an exhibit was inadvertent and inconsequential to the trial. Relying on our decision in **M/s SDV Transami (Tanzania) Limited v. M/s STE DATCO**, Civil Appeal No. 16 of 2011 (unreported) henceforth, **SDV TRANSAMI's** case, the learned advocate invited the Court to hold that the omission to endorse exhibits in the trial giving rise to the instant appeal was fatal warranting its nullification and an order for a fresh trial.

Unmoved, Mr. Richard Giray, learned advocate who represented the first and second respondents, urged the Court to reject the

appellant's invitation. He argued in reply that the circumstances in the instant appeal are different from those obtaining in **SDV TRANSAMI's** case (supra) because the appellant's documents in the instant appeal were admitted without any objection from the respondents whereas, in that case, annexures were treated as exhibits. With respect, we are inclined to endorse the submissions by the learned advocate for the first and second respondents being satisfied that the circumstances in this appeal are not similar to what transpired in **SDV Transami's** case (supra). That case did not involve omission to endorse exhibits, rather, the trial court relied on annexures which were not tendered in evidence as exhibits contrary to Order XIII rule 7(1) of the CPC. That decision is irrelevant and distinguishable to the instant appeal in which it is plain that the documents tendered for the appellant were admitted and indeed without any objection. In our view, and mindful of the dictates of rule 115 of the Tanzania Court of Appeal Rules, 2009 (the Rules), the omission to endorse the exhibits (if any) did not affect the merits of the decision. Rule 115 of the Rules provides:

> *"No judgment, decree or order of the High Court shall be revised or substantially varied on appeal, nor a new trial ordered by the Court, on account of any error, defect or irregularity, whether in the decision or otherwise, not*

affecting the merits, or the jurisdiction of the High Court; and in the case of a second appeal this Rule shall be construed as applying to both the trial court and the first appellate court."

Taking the argument further, regardless of the quantity, we hold the omission to endorse the exhibits in this appeal was as inadvertent as what transpired in **Standard Chartered Bank (T) Ltd**'s case (supra). Apparently, there is no dispute that the documents referred to as exhibits in the trial court's judgment were not admitted as such. It baffles our mind that it is the appellant rather than the respondents complaining of lack of endorsements of her own documents. Without further ado, we reject the appellant's prayer which takes us to the merits of the appeal.

Mr. Rwegasira took an issue against the trial Judge refusing to award the appellant special damages contrary to his own finding on the existence of damage to her properties in the course of the eviction. Submitting further, Mr. Rwegasira argued that it was wrong for the trial Judge to peg the appellant's claim for compensation found to have been proven against the first and second respondents' claim for loss of business to open a nursery school at the premisses. He thus invited us to uphold the sole ground and allow the appeal with costs.

Submitting in reply, Mr. Giray had three arguments. One, contrary to the appellant's contention, the trial judge did not find the damage established and proved rather, he simply noted it. Two, the appellant was not entitled to any notice prior to eviction because she was a trespasser who had no right to any compensation for the alleged damage. Three, at any rate, annexure P6 on the basis of which the appellant claimed compensation was not admitted as an exhibit and for that matter, the trial court rightly rejected it. On the above submissions the Court was invited to dismiss the appeal with costs. Mr. Rwegasira did not see the necessity to exercise his right to a second word by way of rejoinder.

We shall start with the aspect whether there was any finding on the proof of damage and if so, was the trial judge correct in not awarding compensation to the appellant? We have no doubt that the appellant's advocate was influenced by the following excerpt in the impugned judgment addressing the last issue on what reliefs were the parties entitled to: He stated: -

> *"There is a **possibility** that there might have been damage to some of the property judging from the way they are scattered all over the place-photographs in Exh. P2. **How I am able to tell the extent of damage***

from the photographs is to be frank a herculean task. *Much as I have already observed that the, plaintiff was not justified to stay in the premises without paying rent for all that long and she deserved to be evicted; she did not deserve to have her property damaged in the process. I note that Tshs 18, 315,000/= is claimed for that damage.... The only claim for the damaged property has however to be considered in light of defendant's claim that they were denied the opportunity to open a nursing school. It is not unreasonable to say that as a result they also suffered loss."* (emphasis added; at p. 273 of the record).

We agree with the learned advocate for the first and second respondents that the learned trial Judge just noted the possibility of the appellant suffering damage in the process of the impugned eviction. Contrary to the submission by Mr. Rwegasira, we read nothing from the trial court's judgment in the form of a finding that the appellant proved special damage in the sum of TShs 18,315,000/=. It is plain that the learned trial Judge indicated that he had difficulties in telling the extent of the damage from photographs in exhibit P2 and hence his remarks that the task was a herculean one. That statement justifies the trial Court's unpreparedness to award the claimed compensation on the basis of exhibit P2 alone. One would have expected that the matter should

have ended there. However, a little later the learned trial Judge found another reason not to award the appellant compensation on account of the loss of opportunities claimed by the respondents. Like the learned advocate for the appellant, we also get the impression that the learned trial Judge changed his stance and this is what appears to have influenced the appellant's complaint in ground one.

In our view, that was wrong because, the award was in a form of special damages on which, once established by specifically pleading it and strict proof, there was no room for assessing the quantum in the same way he could have done with regard to general damages. It will be recalled that the learned trial Judge rejected the claim on general damages on ground that such relief could not be awarded to an illegal tenant.

Secondly, as rightly submitted by Mr. Giray, annexure P6 on the basis of which the claim was made did not form part of the evidence on record; it had no evidential value and for that reason, the trial court should not have relied upon it to award compensation – See: **Japan International Cooperation Agency (JICA) v. Khaki Complex Limited** [2006] T.L.R. 343 relied in **SDV Transami's** case (supra). Lastly, we once again agree with the learned advocate for the

respondents that since it was proved that the appellant was a trespasser, she had no right to benefit from her wrongful act. At worst, the appellant assumed the risk arising from her unlawful occupation in the premises. Just as she was not entitled to any notice before eviction, she had no right to claim any compensation from the forceful eviction.

In the event, we find no merit in the appellant's appeal and we dismiss it with costs.

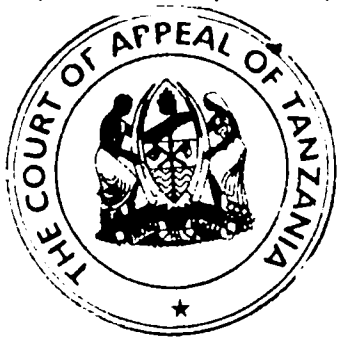
DATED at **TANGA** this 8th day of June, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Judgment delivered this 9th day of June, 2021 in the presence of Mr. Ahmed Makalo, learned counsel holding brief for Mr. Switbert Rwegasira, learned counsel for the Appellant, the 1st, 2nd and 3rd Respondents present in person, is hereby certified as true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL