IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB REGISTRY

AT ARUSHA

LAND APPEAL NO 215 OF 2022

(C/f District Land and Housing Tribunal for Arusha, Application No. 20 of 2021)

ELIZABETH LOIRUKI LOIBANGUTI ..... APPELLANT

VERSUS

THE REGISTRERED TRUSTEES

OF TANZANIA YMCA ..... RESPONDENT

JUDGMENT

04th September & 16th October 2023

KAMUZORA, J.

This appeal arises from the judgment and decree of the District Land and Housing Tribunal (DLHT) for Arusha at Arusha in application No 20 of 2021 (herein to be referred as trial Tribunal). Briefly, the Respondent herein sued the Appellant herein before the trial Tribunal praying for the following; a declaration that the Appellant is in arrears of rent to the tune of Tshs, 1,600,000/=, an order to compel the Appellant to pay the said rent arrears and the accrued rent thereafter, an order of evicting the Appellant from the leased premises, payment of interest, general damages as well as the costs of the suit.

Upon full trial, the DLHT concluded that the Appellant was indebted to the Respondent for a total of Tshs 1,600,000/= being rent arrears which, she was ordered to pay. The Appellant was also ordered to pay rent at the tune of Tshs 1,050,000/= per month from January 2021 until he handles the leased premises back to the Respondent and further ordered to vacate the leased premises and pay costs of the suit. Dissatisfied by the said decision, the Appellant appealed to this court armed with four grounds of appeal hereunder reproduced:

1) *That, the trial Chairperson of the DLHT erred in law and fact when allowed the Respondent's application with costs and decreed in her favour in absence of the lease agreement which is the bases of a claim and the centre of the dispute.*
2) *That, the trial Tribunal chairperson erred in law and fact when awarded the Respondent the amount of Tshs 1,050,000/= per month while the same was never claimed by the Respondent and there is no any agreement to substantiate such a claim which has the quality of special damage that required proof.*
3) *That, the trial Tribunal erred in law and fact when adjudicated the matter while it was not properly composed.*
4) *That, the trial chairperson erred in law and fact when failed to evaluate evidence on record.*

Hearing of the appeal was by way of written submissions, whereas, both parties complied to the submissions schedule. The Appellant

appeared in person while Mr. John Materu appeared, drafted and filed documents on behalf of the Respondent.

Arguing in support of the first ground of appeal, the Appellant stated that, the trial Tribunal erred to rule in favour of the Respondent in absence of a lease agreement. That, before the trial Tribunal, the lease agreement that was tendered for identification purpose only and not to resolve the issue on whether there existed lease agreement between the parties. The Appellant claimed that the said lease agreement has no evidential value as it was only for identification purpose. She cemented her point with the case of **Ngorika Bus Transport Co. Ltd and another Vs. Ismail Abdulrahaman Divekar**, Civil Appeal No 15 of 2019.

Referring to paragraph 5 of the Appellants WSD filed at the trial Tribunal, the Appellant further submitted that the Respondent is trying to frustrate the renewal of the contract and the trial Tribunal reached its decision basing on the lease agreement that was not tendered before it. The Appellant prayed for this court to differ with the Tribunal findings and referred this court to the case of **Yasini Ramadhani Chang'a Vs. Republic** [1999] TLR 489.

On the second ground, the Appellant submitted that there is no any evidence that the investors were ready to pay rent at a tune of Tshs 1,050,000/= per month. That, the amount awarded under paragraph 2 of the decree has the nature of specific damages which ought to have been proved. The Appellant supported her argument with the case of **Alfred Fundi Vs. Geled Mango,** Civil Appeal No 49 of 2017. The Appellant added that the said relief was granted by the trial Tribunal despite the same not being prayed for in the application contrary to the principle stated in the case of **James Funke Ngwagilo Vs. Attorney General** [2004] TLR 161.

Submitting for the third ground, the Appellant argued that there is no clear reasoning by the trial Tribunal for the absence of one of the assessors that made the trial Tribunal to proceed with hearing under section 23(3) of Cap 216 RE 2019. She was of the view that since composition of the Tribunal is a jurisdiction matter, in the absence of cogent reason of assessor's absence, that touches the integrity of the Tribunal. She insisted that the proceedings must be clear and bear transparency. The Appellant referred this court to the case of **Cleophas Kaiza Vs. Potence Mugumila,** Civil Appeal No 378 of 2021 CAT at Bukoba.

On the fourth ground, it is the Appellant's submission that, the decision reached by the DLHT was based on the document tendered for identification. The Appellant claimed that there was a serious violation in valuation of evidence by the trial Tribunal. Referring the case of **Paulina Samson Ndawamvya Vs. Theresia Thomasi Madaha,** Civil Appeal No 45 of 2017 CAT at Mwanza, the Appellant argued that the one who alleges bares burden of proof. She explained that weakness in defence case that the defendant failed to prove payment of withholding tax to TRA cannot be used as strength to the plaintiff's case. To her, the law under the Income Tax Act requires the landlord to pay withholding tax failure of which, the tenant will be penalised in her business.

The Appellant further submitted exhibit P2 could not be used to prove the outstanding rent as the same was all about condition on the end period of the contract. she added that unlike Exhibit P1, exhibit P2 was not read in court hence can not be used to uphold the alleged claim of Tshs 1, 600,0000. She supported her submission with the case of **Omary Sultan @ Doga and two others Vs. R**, Criminal Appeal No 30 of 2020 on the value of the document not read out before the court after admission. In concluding, the Appellant prayed that the appeal be allowed with costs.

In reply, the counsel for the Respondent submitted that the record shows that the land lord and tenant relationship ended on 31st December, 2020 and was not renewed as supported by exhibit P1 collectively and the Respondent's oral evidence. That, the Appellant's request for renewal for contract was never granted as she was not ready to pay new rent thus, even in the absence of the tenancy agreement, the parties tenant landlord relationship ended in 31st December, 2020. He insisted that the first issue in whether the Appellant was lawfully occupying the leased premise after 31st December 2020 was properly answered.

Responding to the second ground on the award of Tshs 1,050,000/=, the counsel for the Respondent submitted that the evidence of SM1, SM2 and SM3 was clear that monthly rent per one slot was Tshs 150,000/=. That, the Appellant occupied 7 slots and if multiplied by the amount per slot, the proper rent to be paid was Tshs 1,050,000/= per month. The counsel for the Respondent was of the view that, since the evidence by the said witnesses was not controverted and the Appellant continued staying in the 7 slots even after the expiry of the contract, impliedly, she consented to the new rent. The Respondent counsel added Tshs 1,050,000/= was not awarded as

specific damage rather as accrued rent for continued occupation of the leased property by the Appellant.

On the argument that the Tribunal awarded 1,050,000/= that was not claimed by the Respondent, the counsel for the Respondent submitted that under paragraph 7 (ii) the Respondent prayed for outstanding rent of 1.6 million plus accrued rent of 1,050,000/= per month. The claim for award was also prayed orally by AW1 thus, cited authorities by the Appellant were distinguishable.

On the third ground regarding the composition of the trial Tribunal, it is the Respondents submission that the Appellant argument is misconceived. He explained that before the trial Tribunal, parties agreed to proceed with one assessor. He added that, even section 23 (3) of the Land Disputes Courts Act Cap 216 RE 2019 allows the course taken by the Tribunal Chairperson hence urged this court to distinguish authorities cited by the Appellant.

On the fourth ground based on evaluation of evidence, the counsel for the Respondent submitted that at page 8 to 10 of the Tribunal judgment evidence was well evaluated. He further submitted that, in her WSD, the Appellant did not deny the outstanding rent of Tshs 1,600,000/= but claimed to have paid Tshs 1,200,000/= to TRA as

withholding tax and admitted only 400,000/=as rent arrears. That, there was no any evidence present by the Appellant proving that the money was paid to TRA. Referring section 112 of the Evidence Act, the counsel for the Respondent insisted the burden of proof as to any particular fact lies on the part who wishes the court to believe in its evidence.

On the argument that the contents of Exhibit P2 was not read after admission, the Respondent's counsel referred this court to page 8 of the trial proceedings and insisted that the same was read. He added that even if the said exhibit was not read out, the omission was curable under section 45 of the Land Courts Dispute Courts Act and the case of **Yakobo Magoiga Gichere Vs. Peninah Yusuph**, Civil Appeal No 55 of 2017 which refers the overriding objective. That, the Appellant has not stated on the prejudice caused by the said omission.

In her rejoinder, the Appellant reiterated her submission in chief and added that new lease agreement could be determined based on previous agreement. That since no previous agreement was tendered, it cannot be said that there was a new agreement between the parties. She insisted that it was wrong for the trial Tribunal to rely on the contract that was tendered for identification purpose only. The Appellant added that section 82 (1)(a) of the Income Tax Act requires payment of

withholding tax on rent at the rate 10 percent. That, the Respondent never denied to have not paid withholding tax and the law imposes penalty to the tenant and not the landlord.

I have considered the record of the trial Tribunal, grounds of appeal and submission for and in contest of this appeal. I will deliberate on the grounds of appeal by adopting a sequency from that adopted by parties. I will start with the 3rd ground which relate to procedural irregularities before going to the 1st, 2nd and 4th grounds which requires assessment of evidence.

Starting with the third ground, the Appellant faults the trial Tribunal's decision to proceed with adjudication of the matter in the absence of one assessor. The Respondent's counsel insisted that the Tribunal move was backed by law. The law, section 23 of the Land Disputes Courts Act Cap216 R.E 2019 govern composition of the Tribunal. The said section read;

> ***23****.-(1) The District Land and Housing Tribunal established under section 22 shall be composed of at least a Chairman and not less than two assessors.*
>
> *(2) The District Land and Housing Tribunal shall be duly constituted when held by a Chairman and two assessors who shall be required to give out their opinion before the Chairman reaches the judgment.*

(3) Notwithstanding the provisions of subsection (2), if in the course of any proceedings before the Tribunal, either or both members of the Tribunal who were present at the commencement of proceedings is or are absent, the Chairman and the remaining member, if any, may continue and conclude the proceedings notwithstanding such absence."

From the above provision, section 23 (1) and (2), gives mandatory requirement for the Tribunal to sit with not less than two assessors who must give their opinion to the matter. However, subsection (3) of section 23, gives exception by allowing the Tribunal to continue with the proceedings in the absence of either or all assessors in case of non-appearance. I therefore agree with the counsel for the Respondent that the Tribunal's move was backed by law. She basically referred the provision which gave her mandate to proceed in the absence of one or both of the assessors.

It was however contended by the Appellant that no reason was advanced by the trial Tribunal for deciding to proceed in the absence of one assessor. In my perusal to the record, I discovered that the reason was well advanced by the trial Tribunal. At page 23 of the Tribunal proceedings, it is recorded that one assessor could not appear as he travelled to Lindi. The Tribunal referred parties to the requirement of section 23 (3) and both parties responded and agreed to proceed. It is

also clear that only one assessor who attended the hearing to the conclusion gave opinion as reflected in the trial Tribunal's judgment. Thus, the Appellant cannot claim at this stage that no reason was advanced for proceeding in the absence of one assessor. In fact, the trial Tribunal complied to the legal requirement hence, I find no merit in this ground.

Reverting to the first ground, the Appellant claim that the trial Tribunal based its decision on the document admitted for identification purpose only and not as exhibit. Going through the trial Tribunal record especially page 6 of the typed proceedings, there is no doubt that the lease contract was admitted for identification purposes only.

It is a settled position that any documentary exhibit admitted for identification purpose if not produced as exhibit does not form part of evidence. In other words, it has no evidential value. See, **Rashid Amiri Jaba and another Vs. Republic,** Criminal Appeal No 204 of 2008 CAT at Dae es Salaam (Unreported). Now the question is whether the Tribunal decision was solely based on the exhibit admitted for identification.

It is clear that the trial Tribunal at page 8 of its decision referred the lease agreement (admitted for identification) in assessing the existence

of the lease agreement between the parties. She however made clear that parties were not contesting existence of the lease agreement which expired on 31st December 2020. The evidence in record is also clear that parties were not contesting the existence of the lease agreement that was admitted for identification. At page at 15 of the trial Tribunal typed proceedings, the Appellant herself admitted to have entered into a lease contract with the Respondent for a period of five years commencing from 01st January 2016. At page 9 of the judgment, the trial Tribunal referred the defence evidence whereas the Appellant and her witness conceded to the existence of lease agreement between the Appellant and the Respondent. Thus, the contention that the trial Tribunal's decision was based on the document admitted for identification is baseless. In my view, even in the absence of written contract, there was no dispute that parties entered into a lease agreement which came to an end by 31st December 2020. I therefore find the first ground of appeal devoid of merit.

On the second ground the Appellant alleged that the award of Tshs 1, 050,000/= by the trial Tribunal was made without any justification as no prayer for such award was made by the Respondent. It was however contended by the Appellant that the same was claimed under paragraph

7 (ii) of the application. Reading the said paragraph, it shows that the Respondent claimed for the award of accrued rent based on the amount started at 6(iv). The said paragraph 6 (iv) read,

> *"That, the act of the Respondent (Appellant herein) to continue to occupy the plot after 31/12/2020 about 7 new investors have called in with the desire to invest with a total rent of Tshs 1,050,000/= per month the sum keeps accruing on the Respondent."*

Reading the said paragraph, the Respondent herein was claiming to for accruing rent based on the amount offered by other investors for the same property. Thus, it cannot be said that such amount was never pleaded by the Respondent. However, the question is whether, the said amount was justifiably awarded by the trial Tribunal.

There is no doubt that after the lapse of the first contract on 31st December 2020, parties never agreed on the term of renewal of the contract. While the Respondent desired not to renew the contract unless the Appellant agrees to the new rent proposal, the Appellant desired to maintain tenancy relationship without additional rent. In short, the continued occupation of the rented premise by the Appellant was by default and not by agreement between parties. Thus, the contention that the Appellant's occupation after the expiry of the first agreement impliedly meant that she agreed to the new rent is unjustified. That was

acceptable only stand if the Appellant was not resisting the proposed new rent. Thus, the award of Tshs 1,050,000/= as accrued rent against the Appellant cannot stand.

This court however understand that since the Appellant did not deny her continued occupation of the rented premise, she is bound to pay the accruing rent based on the original rate of Tshs 200,000 per month from 1st January 2021 until she gives vacant possession of the rented premise. I therefore partly allow this ground.

On the fourth ground the Appellant alleged that there was no proper evaluation of evidence by the trial Tribunal. The argument was based on the award of outstanding rent and burden of proof.

Regarding the award of the outstanding rent arrears, it was the claim by the Appellant that the trial Tribunal reasoning was based on Exhibit P2 which was not read before the Tribunal after its admission. It is true that the record does not show if the said exhibit was read out after its admission, but it is not true that the Tribunal decision was based on Exhibit P2. When evaluating evidence for determination from page 8 to 11 the Tribunal never referred exhibit P2 as evidence supporting the Respondent's case. The said exhibit P2 is just a demand letter which in anyway, does not prove claim. From the above-

mentioned pages, it is clear that the Tribunal's decision was entered upon evaluating and assessing evidence presented by parties before it.

Without more ado, this court is satisfied that the Respondent discharged burden of proof on the balance of probabilities as required by section 110 of the Evidence Act Cap 6, R.E. 2019 and well propounded by Sarkar on Sarkar's Laws of Evidence, 18th Edn., M.C. Sarkar, S.C. Sarkar and P.C. Sarkar, published by Lexis Nexis where it was stated;

> *"... the burden of proving a fact rest on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof. It is ancient rule founded on consideration of good sense and should not be departed from without strong reason .... Until such burden is discharged the other party is not required to be called upon to prove his case.* ***The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden.*** *Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party..." [Emphasis added].*

In the current appeal, the Respondent claimed and proved Tshs 1,600,000/ as rent arrears and the Appellant was unable to prove that she paid the same to the Respondent. The Appellant's allegation that

she paid part of the rent, Tshs 1,200,000/= as withholding tax to TRA on behalf of the Respondent was unproven. The law on withholding tax is clear, it refers to tax withheld by the person making payment of certain amount to another person in respect of goods supplied or services rendered. The person making payment has an obligation to withhold tax and remit the same to TRA. It is true that section 82 (1)(a) of the Income Tax Act is a relevant provision as regard to withholding tax. While the Appellant claim to have paid withholding tax under the Provision of section 82 (1)(a) of the Income Tax Act, no evidence was submitted by the Appellant to the Tribunal proving the amount payable as withholding tax and to authenticate payment of withholding tax to TRA. The Appellant's contention that the Respondent did not deny obligation for withholding tax is baseless. Since the Appellant is the one who claimed to have paid withholding tax, she was bound to authenticate the payment for the same.

In addition to that, it is clear that the Respondent claimed for payment of rent and was able to show that they never received payment of the outstanding rent from the Appellant. The Appellant alleged to have paid the same to TRA as withholding tax but she was unable to prove if she real paid the same. Having not proved so, the

Appellant cannot claim that the Tribunal based on the weakness of defence to strengthen plaintiff's case. I am inclined to refer the Respondent's argument based on section 112 of the Evidence Act which gives burden of proof of a particular fact to a part who wishes to court to believe its existence. The said provision read: -

> ***112.*** *The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any other person.*

In that regard, the Tribunal correctly held that the Appellant was bound to prove payment of withholding tax failure of which, liable to pay the total claimed amount. In totality and in considering the Tribunal's judgment, I find that the trial Tribunal correctly assessed and evaluated the evidence of both parties before arriving to its decision. I therefore find this ground devoid of merit.

In the final analysis, I find this appeal devoid merit save for the second ground which is partly allowed to the extent that only Tshs 200,000 will be paid as accruing rent from 1st January 2021 to the date the Appellant vacate the Respondent's property. Costs of this appeal be borne by the Appellant.

DATED at **ARUSHA** this 16th day of October 2023.

D.C. KAMUZORA

JUDGE