IN THE HIGH COURT OF TANZANIA
(DSM DISTRICT REGISTRY)
AT DAR ES SALAAM

CIVIL APPEAL NO. 24 OF 1998
(An appeal from Housing Appeal No.59 of 1997 originating from Application No.92 of 1997, D'Salaam Regional Housing Tribunal)

HERKIN BUILDERS LTD.....APPELLANT
VERSUS
MARIAM PETER KALEKEZI.....RESPONDENT

JUDGEMENT

KALEGEYA,J.

The Appellants, M/S Herkins Builders Ltd, are before this court challenging the order of the Housing Appeals Tribunal (HAT) which rectified the DSM Regional Housing Tribunal's decree.

The background to the controversy is as follows. Sometime in 1994 the Appellant and Respondent executed a lease agreement under which the appellant was to occupy the Respondent's premises till year 2000 at a monthly rent of shs 14,000/-. However, as the premises needed rehabilitation the Appellant undertook the task and indeed repaired the premises at a sum of shs 401,460/=. The agreement further provided that half of the monthly rent would be paid to Respondent while the other half would be accumulated and retained by the Appellant until the whole sum paid for repair costs is recouped. It was further agreed that either party could terminate the agreement by giving a three month's notice. That settled, one of the company officials, P.M. Leonard, went into occupation of the same. Early 1997, having been allocated another suitable accommodation by the Employer (appellant), Leonard shifted from the leased premises. The Company, Appellant, allocated the premises to another officer. The Respondent could not stomach this change. She refused the change and instead locked up the premises. After various heated written correspondences between the appellant and Respondent, one of such correspondents being a three months notice dated 13/3/97 issued by the latter, the former

The Honourable members unanimously opined that the applicant should give vacant possession. The respondent on her part should be condemned to pay the balance of money i.e. shs 233,460/=. Their opinion is based on the relevant term of tenancy agreement and on the evidence available. I join hands with them. And I would add even the applicant are not opposed to that position. The evidence speaks for itself. I would however further add that the respondent should also pay for the three months notice at a rate of Shs 14,000/= per month. That means as an attendant consequence, there is no point of refunding or compensating the applicant the costs of accommodating their employee in another premises.

That said, accordingly, judgment is entered to the extent shown above i.e. the applicant to vacate the suit premises, the respondent to pay a balance of shs 233,460/= to the applicant that being rent paid in advance, the respondent is also condemned to pay for three months notice at a rate of Shs 14,000/= per month, and lastly as usual she is condemned to pay costs of this application."

Clause 7 of the lease agreement relied upon by the learned Vice-Chairman of the Regional Tribunal provided as follows:

" (7) the landlord shall give a notice of three (3) months in advance in case of any intention to terminate agreement, whereby the tenant shall stay for that period, without paying any rent to the landlord before vacating the house."

Not all of the above decision amused Respondent. She did not accept the verdict on costs. She sought to challenge the order on this in the Housing Appeals Tribunal (HAT) as follows:-

" The Appellant above named being aggrieved by the order of the Regional Housing Tribunal in the above named application appeals to this court on the following ground:

THAT the Honourable Chairman of the Regional Housing Tribunal grossly erred both in facts and law to condemn the Appellant to pay costs of the application.

WHEREFORE the appellant prays that the Regional Housing Tribunal order be reversed in favour of the Appellant."

Upon receipt of the record and memo of appeal the HAT proceeded to give an order whose opening statement runs as under,

" Order: at this stage of admission or otherwise of the impending appeal which originates from Dar es Salaam Regional Housing Tribunal application No.92 of 1997, two things are going to be deliberated on. But before doing so let me give a short background of the case."

Then, the Chairman of the HAT proceeded to dispose of the appeal forthwith and ordered: -

" Under rule 43 of the HAT (appeals) Rules, 1987 the decree of the trial Tribunal is rectified to read that: -

1. *As the application ought to have been dismissed with costs to be borne by the then applicant, it is so ordered.*
2. *The order that the applicant had to vacate the suit premises on Plot No.388 Block 44 Kijitonyama area in Kinondoni district Dar es Salaam City, is to remain undisturbed.*
3. *That the respondent had to pay a balance of shs 233,460 = to the applicant is set aside and instead the respondent will pay to the applicant a sum of shs 191,460 = being the balance from the construction costs.*
4. *That the respondent was to pay the applicant shs 42,000 = being three months' notice at a rate of shs 14,000 = monthly is set aside."*

This time the weight shifted unto the other foot: the Appellant could not accept the almost u-turn verdict contained in the HAT's decision hence the appeal to this court praying;

> *" the order of the Housing Appeals Tribunal be quashed and set-aside and that of the Regional Housing Tribunal be reinstated"*

on the following grounds:

1. *That the Honourable Chairman of the Housing Appeals Tribunal erred both in law and fact by rectifying the decree of the trial tribunal.*

2. *That the Honourable Chairman of the Housing appeals Tribunal erred both in law and fact by ordering that the Appellant herein bear the costs.*

3. *That the Honourable Chairman of the Housing Tribunal erred in fact by ordering that the Respondent herein has to refund the appellant herein a sum of T.shs 191,460/= only being the balance from the construction costs.*

4. *That the Honourable Chairman of the Housing Appeals Tribunal erred both in law and in fact by setting aside payment of T.shs 42,000/= by the Respondent herein to the Appellant herein for the 3 months notice.*

5. *That the Honourable Chairman of the Housing Appeals Tribunal erred in law by taking into consideration matters he ought not to have taken.*

6. *That the Honourable Chairman of the Housing Appeals Tribunal erred in law by not taking into consideration matters he ought to have taken.*

Dr. Mvungi appeared for the Appellant while Mr. Kifunda did the same for Respondent.

Dr. Mvungi illustrating on the grounds of appeal insisted that the learned Chairman of the HAT erred in deciding on matters which were not part of the memorandum of appeal, on which they were given no opportunity to argue and that costs should have been awarded in favour of his client. On the other hand Mr. Kifunda argued that the HAT decision was very sound because the Appellant's prayers having been

refused costs had to follow the event: that the one who lost and who is the Appellant was properly adjudged to pay. As regards the amount to be refunded he argued that the contract commenced on 14/8/94 and ended in February when Appellant's officer vacated the premises; that therefore 30 months of occupation multiplied by 7000/= a month = 210,000/= which sum if deducted from 401,460/= the balance is 191,460/= and that the calculations arrived at by the trial tribunal were made through an oversight.

Now for the analysis. I have detailed the background just for clarity otherwise the centre of my decision is very fine indeed, and this is that the learned Chairman of the HAT grossly misapplied Rule 43 of THE HOUSING APPEALS TRIBUNAL (Appeals) RULES, 1987 (GN 249 of 1990) made under S.41 (4) of the RENT RESTRICTION ACT, 1984 (Act No.17 of 1984).

With respect, I have failed to understand how the learned Chairman termed the matter which was before him. As earlier on indicated it was clearly an appeal. It was not a revision initiated by the HAT itself. Whatever may have been the case I see no justification of acting the way the learned Chairman did. Rule 43 under which he purportedly acted falls under PART IV of the Rules and which is entitled "Judgement on Appeal." Rules 40 - 43 fall under this part. Rule 40 – 42 provide for "Judgement, when and where pronounced;" what should be contained therein and what it may direct. Then comes Rule 43 whose marginal notes clearly show that it is a continuation of what is to be done in appeals. The marginal note thereto reads " POWER OF APPEALS TRIBUNAL IN APPEALS." The said Rule provides,

> *" 43. The Appeals Tribunal shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the appeals Tribunal notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection "*

The wording of the quoted rule gives wide powers to the HAT in giving a decision on appeal. It does not give power to the HAT to simply decide on the appeal without hearing the parties. The last 13 words simply refer to a situation where some of

the parties do not appeal or object: in its verdict the HAT may give a decision which touches such parties as well. The opening statement of the learned Chairman's order,

> *" at this stage of admission or otherwise of the impending appeal... ",*

the analysis and orders subsequently made are not backed up by the law. It would have been different if he had summarily rejected the Appeal – Rule 24 of the Rules would have come to his aid but not otherwise.

One fails to see the basis which prompted the learned Chairman to pronounce order/judgement without affording chance to the parties to be heard. That apart, although the HAT, in giving decision is not necessarily bound by the grounds contained in the memorandum of Appeal if it decides on other grounds the opposite party should be given chance to contest them. In here, the appeal before the HAT concerned only costs but the order made by the HAT touched a lot of other matters which neither party was given chance to contest or support. Rule 4 provides:

> *" 4. An appellant shall not, except by leave of the appeals Tribunal, be heard in support of any ground of objection not set forth in the memorandum of appeal, but the appeals Tribunal, in deciding the appeal, shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the appeals Tribunal under this rule.*
>
> *Provided that the appeals Tribunal shall not rest its decision on any other ground unless the party who may be affected thereby has had sufficient opportunity of contesting the case on that ground."*

Dr. Mvungi's quarrel on this is fully justified.

For reasons discussed above the HAT's decision cannot be left to stand. It is accordingly set aside.

The above said, next is what should this court do? The Respondent's appeal to the HAT concerned only costs. She didn't quarrel with other orders. It is only before this court that she revisited the balance on the rehabilitation costs and came up with shs 191,460/= instead of 233,460/= and also challenged the shs 42,000/= as a three month's notice. Should I take these other issues as well or should I limit myself to the question of costs which the Respondent had first fronted in her appeal to the HAT? After

due consideration I am convinced that regard being had to the powers conferred on this court under s.43 of the **Rent Restriction Act (No.17/84)** I am seazed with powers to decide on all issues as raised by the parties.

I will start with the disputed shs 42,000/= for the three months notice. In arriving at this amount the trial Tribunal considered that the present appellant had not breached the tenancy contract and had incurred costs for the upkeep of the officer who was refused occupation of the disputed premises. The tribunal then observed that that sum (shs 42,000/=) sufficed to cover the other costs incurred. The tenancy agreement provided that the tenant would stay three months free of rent in the event the Respondent decided to terminate the agreement. Indeed, only staying in the premises three months free of rent was a term agreed upon and not payment any money. But, in this situation, the Respondent made it impossible for the Appellant to get the benefit of that clause by refusing entry of another officer of the Appellant and closing up the premises. Considering all these factors, I am satisfied that the trial Tribunal's decision in ordering Respondent to pay Appellant an amount equivalent to three months' notice was sound and should not be disturbed. It is confirmed accordingly.

Next is the amount still recoverable out of shs 401,460/= paid by the appellant on rehabilitation. The appellant went into occupation of the premises on 14/8/94 and was locked out in February 1997: that is approximately 30 months. This period entitled Respondent to an accumulated rent of shs 420,000/= (14,000/= X 30). As per their arrangement half that sum was paid to Respondent (7000/= X 30 months) and half was retained in order to defray the shs 401,460/= used on rehabilitation. In order to get what is now due to the appellant we have to deduct shs 210,000/= from 401,460/= = shs 191,460/=. Indeed, the sum of shs 233,460/= assessed by the trial Tribunal was arrived at inadvertently.

Lastly, is the question of costs. The trial Tribunal did not give reasons for awarding costs against Respondent but one can easily grasp the hidden basis. The trial Tribunal found, and rightly so, that the appellant was not in breach of any tenancy terms and conditions. The Respondent was ordered to refund the sum still outstanding and so is shs 42,000/= for the three months notice. In actual fact Appellant substantially succeeded. Added to this is the obvious that Respondent decided to exercise his right

under clause 7 of the agreement **crudely;** closing up the premises. In reality, the causant of this controversy is the Respondent. In my considered view the trial Tribunal soundly awarded costs to the appellant, which award I, hereby uphold.

In conclusion therefore the appeal succeeds to the extent indicated – appellant to be paid, shs 191,460/= being balance of unrecouped sum used on rehabilitation of the disputed premises; shs 42,000/= being equivalent of rent for three months for which they would have remained in occupation of the disputed premises after the notice and costs before both Tribunals and this court.

L.B.Kalegeya,

JUDGE