IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

CIVIL APPEAL NO. 30 OF 2021

(Originating from decision of the Resident Magistrate Court of Mwanza in Civil Case No. 15 of 2020 dated 18/05/2021 Delivered by, B. M Lema, Resident Magistrate.)

NDEONISIA JOSEPH MARENGE..... APPELANT

VERSUS

ILEMELA MUNICIPAL COUNCIL..... RESPONDENT

JUDGMENT

15th July & 29th July, 2022

ITEMBA, J.

Before the Resident Magistrate Court of Mwanza, the appellant herein had instituted a suit against the respondent, in Civil case No. 15 of 2020. The appellant is alleging that the respondent had unlawfully confiscated his goods from his shop situated at room No. 95 and 158 at Buzuruga Bus stand within Mwanza. When the suit reached its finality, a decision was issued in favour of the respondent. The appellant was not amused by the said trial court decision and through his memorandum of appeal he has preferred an appeal before this court. Originally, the

memorandum of appeal had four grounds, but, as it shall be apparent soon, I will not reproduce the said grounds of appeal.

When the appeal came up for hearing parties preferred to proceed with submission by way of writing. Both parties filed the submissions in conformity with the schedule. Submitting in support of appeal, the appellant through his counsels opted to drop ground 1, 2 and 3 of the appeal giving reasons that they do not meet the requirements of the appellant's grievances. In that regard through provisions under Order XXXIX Rule 2 of the Civil Procedure Code [CAP 33 RE 2019], he prayed to submit on two additional grounds of appeal which were not set forth in the memorandum of appeal.

Submitting on the first ground the appellant stated that, the trial court erred in dismissing the suit on ground that there was no evidence. He stated that during trial the respondents' witnesses admitted to have conducted confiscation of goods belonging to the appellant from shop No.95 and 158 at Buzuruga bus stand on 14th and 16th of February, 2017. He further avers that the said witnesses have failed to produce the list of items and their respective value during trial proceedings. He cited provisions under ***Section 112 of the Evidence Act*** and *Court of Appeal decision in the case of* ***Barelia Karangirangi vs Asteria Nyalwambwa,*** Civil Appeal No. 237 of 2017 CAT, (Unreported).

In regard to the second ground of appeal, he contends that, the trial magistrate erred in law by framing wrong issues that led to an erroneous decision. The area of contention between the parties was based on allegation by the appellant that the respondent has illegally confiscated the appellant's goods. He complains that such failure by the trial court has led to miscarriage of justice and it has prejudiced the appellant as the matter he submitted to the court in the hope of receiving justice he deserves was derogated by the trial court, as it did not take into consideration his evidence due to framing of wrong issues. He concluded his averments in respect of this ground by citing provisions under Order XIX Rule 1(5) of the CPC and state that it was contravened by the trial court.

On the third ground of appeal, the appellant states that, the trial magistrate erred in law by stating that the breach of contract by the appellant legalised the respondent's seizure of the appellant's properties. He submitted further that the appellant was not in breach of any contract but rather they were in negotiation processes with the respondent concerning new rental fees.

In respect of the conclusion drawn by the trial court that the appellant breached the contract, he is of the firm view that it was an error. That the trial magistrate quoted paragraph 6 of the old lease agreement

but the current one provides that, when a tenant defaults to pay his rent, he will be in breach of contract and within 7 days he would be served a notice to pay rent by the marketing and legal department and when he fails to adhere, the shop would be closed and lease it to another person. He further contends that the said paragraph does not give any power for the respondent to confiscate the goods of the tenant.

Lastly on a recovery of rent by the respondent he submitted that, levy distress for rent is provided for under ***Section 102 of the Land Act,*** [CAP 113 RE 2019]. He added that the said section provides for conditions to be followed in this process of seizure of another's property to secure the performance of a duty, such as the payment of overdue rent. In respect to the current matter at hand he argues that the procedures were not properly followed. In the end he prayed the court to allow the appeal, quash the decision and award the appellant Tshs 98,503,500/= and costs to be borne by the respondent.

On his part the respondent through his learned counsel, submitted that, the claims by the appellant at the trial court were for specific damages hence they were supposed to be specifically pleaded and proven. That the appellant was supposed to prove the amount claimed by tendering purchase receipts to that effect, something which was not done. He contended further in respect of this ground that DW1 had stated that

in the room No. 95 there were few things which amounted to TZS. 1,300,000/= only after they were auctioned. In respect of room No.158 they only found two empty crates of soda. On the burden of proof, he stated that it is trite law that he who alleges must prove and appellant has failed to discharge such duty in the trial court. He cited decision in the cases of ***Dr. A. Nkini & Associates Limited vs National Housing Corporation,*** Civil Appeal No. 72 of 2015 CAT at Dar es Salaam, ***Director Moshi Municipal Council vs Stanlenard Mnesi and Another,*** Civil Appeal No. 246 of 2017 CAT at Arusha, ***Director Municipal Counsel vs John Ambrose Mwase,*** Civil Appeal No. 245 of 2017 CAT at Arusha and ***Geita Gold Mine Limited vs Twalib Ismail and 3 Others,*** Civil Appeal No.103 0f 2019 CAT at Mwanza.

On the second ground of appeal, he submitted that, framing of issues involved the advocates for the parties and they all agreed to the issues. The court didn't force its issues, both counsels proposed issues at the time of framing and they both agreed that they were relevant and sufficient. He added that parties adduced evidence on the aspect of whether the defendant was justified to confiscate the appellants goods, and PW1 in his testimony has narrated as to legality of the process of confiscating the said goods which led to the finding of the court that the appellant was in fault. He is of the view that it cannot be said that such

an issue was not determined. On the complaint that it was not in dispute that the appellant was a tenant of the respondent therefore the court was not supposed to frame such issue he is of the view that the same was crucial for determination of controversy in the matter. He supports the holding of the trial magistrate that he determined the legality of the defendant taking of the appellant's goods because it was pleaded and both parties adduced evidence in that aspect. To cement his arguments, he cited the decision in the case of ***James Funke Ngwagilo vs Attorney General*** [2004] TLR 161.

In respect of the third ground of appeal in which the appellant complains that, the learned trial magistrate erred in law and fact by stating that the breach of contract by the appellant legalised the respondent's illegal seizure of the appellant's properties. He submits that, the appellant didn't have valid lease agreement with the respondent at the time of the incidence. He alleges that, he had not paid rent since June, 2016 hence there was no need even to issue notice, and what the counsel for the appellant is trying, is to come up with imaginary facts which were not established in the evidence only to impress this court to decide in the favour of the appellant. He supported his averments in respect of this ground by the decision in the case ***Dr. A. Nkini Associates Limited*** (Supra) that no party should benefit from its own wrong.

In conclusion, the counsel for the respondent brought into attention of the court the issue of time limitation of the civil case No.15 at the trial court that cause of action occurred on 14th February, 2017 and the suit was instituted on 13th February, 2020. In the end he prays this court to dismiss the appeal with costs.

I will start with the 4th ground of appeal given its decisive importance. In responding to this ground, the 1st ground will be covered as the two are related. The 4th ground relates to the trial magistrate decision that the breach of contract by the appellant legalised the respondent's seizure of appellant's properties while the 1st ground relates to type of evidence relied by the trial court to reach its decision. Having gone through the records, there is no dispute that it was the appellant who built the shops in question in 1992 and in 2010 all the shop owners had to pay rent to Nyamagana Municipal, following the nearby location of the shops being turned into a bus stand. It is also undisputed that the rent was initially TZS 20,000 per month and it was later increased to TZS 200,000 by this time the bus stand was under the control of Ilemela Municipal. There is no evidence whatsoever which shows there was such a new contract with a rent of TZS 200,000 per month and thus there is no evidence of the appellant breaching the contract or in other words,

there is no amount established by the respondent as the rent arrears against the appellant.

In respect of confiscation of the appellant goods, I will be guided by section 102 of the Land Act [CAP 113 RE 2019] which provides as follows;

> *(1) Subject to the provision of subsection (3), a lessor may only exercise his right to levy distress for rent after service of a notice in accordance with the provision of section 104.*
>
> *(2) Where it is not possible to peacefully exercise a right to levy distress,* ***the lessor shall only do so under the order of the Court.***
>
> ***(3) The exercise of the right to levy distress shall only be exercised using a Court broker or a broker of a tribunal.***

Further to that, I find it apt to reproduce a descriptive definition as deduced from Black's Law Dictionary, 8th Edition where Distress is defined to mean:

> *'The seizure of another's property to secure the performance of a duty, such as the payment of overdue rent.'*

The quoted excerpt gives an equivocal position which implies that a party wishing to exercise his right to levy distress for rent has to first

acquire court order. Looking at the proceedings and the decision of the trial court, it is clear through ***exhibit P1*** that the respondent and appellant had entered into lease agreement, the evidence also shows that the appellant has defaulted payment of rent, hence the respondent issued a demand note to the appellant on 24th May, 2017 through which he requested him to pay total amount of TZS 2,250,000/= being rent arrears. At page 32 of the typed proceeding DW1, had stated as follows;

> *'...after the seizure of all items in room No. 95, the plaintiff failed to appear and pay the arrears and rescue his items. Later we wrote the letter to Ilemela P/C and requested for permission to sell by auction all items collected in operation and arranged an auction. We after permitted we established the notice for public auction through introduction letter, public awareness P.A system and informed the place and date of selling to start at 10:00 HRS.'*

From this passage, the respondent has informed the trial court that they acquired court order which allowed them to sell by auction the appellant's properties. Unfortunately, nothing was tendered to prove such allegations. The law places a burden of proof upon a person who desire the court to give judgment on his side and such a person who asserts existence of facts to prove that those facts exist. This position is provided under ***Section 110 (1) and (2) of the Evidence Act,*** [Cap.6.]. Section

3 of the same Act, such fact is said to be proved in civil matters, when it is established by a preponderance of probability. In the decision of ***Godfrey Sayi vs Anna Siame as Legal Representative of the Late Mary Mndolwe***, Civil Apeal No. 114 of 2012 (Unreported) it was stated that:

> *'It is similarly common knowledge that civil proceedings, the party with legal burden also bears the evidential burden and standard in each case is on a balance of probability.'*

In the decision of ***Ernest Sebastian Mbele vs Sebastian Sebastian Mbele and two others,*** Civil Appeal No. 66 of 2019 (Unreported, the Court of Appeal cited in approval, the decision of Supreme Court of India, on a preponderance of probabilities, in the case of ***Nayaran Ganesh Dastane vs Sucheta Nayaran Dastane*** (1975) AIR (SC) 1534 Thus:

> *'The normal rules which govern civil proceedings is that the fact can be said established if it is proved by a preponderance of probabilities. This is for reason that....a fact is said to be proven when the court either believes it to exist or consider its existence so probable that a prudent man ought to act upon supposition that it exists. A prudent man faced with conflicting probabilities concerning a fact that the fact exists, if on weighing the various probabilities he finds that the preponderance is in favour of the existence of the*

particular fact. As a prudent man, so the court applies this test for finding whether a fact in issue can be said to be proved. The first step in this process is to fix the probabilities, the second to weigh them, though the two may often intermingle. The impossible is weeded out at the first stage, the improbable at the second. Within the wide range, of probabilities the court has often a difficult choice to make but it is this choice which ultimately determines where the preponderance of probabilities.'

Deducing from his evidence DW1 has given a bare statement in his examination in chief that they acquired court order to sell by auction the appellants properties. He did not tender any document to support such averments. Mere assertation without further proof in my opinion was not sufficient. I join hands with the averments by the learned counsels for the appellant that the procedures provided under ***Section 102 of the Land Act*** were not followed by the respondent. Therefore, it was wrong for the trial magistrate to hold that the sale by the respondent was lawful in that breach of contract by the appellant legalised the respondent's seizure of appellant's properties. As stated above the loss caused by the said breach if any is not established. Even if there was a breach, the law regarding confiscation has to be adhered. The respondent ought to firstly acquire a

court order to that effect and then, proceed with distress for rent processes.

In line with above arguments, the appellant has claimed total payment of Tshs. 98,503,500/= being specific damages. The appellant in proving his allegation during trial has tendered ***exhibit P2*** and ***exhibit P3*** being the list of confiscated goods by the respondent from room No. 95 and room No. 158. Looking at the said exhibits, I find that they do not support the appellant's contention since the exhibits are only lists of goods without any other proof to support such allegations, this view has also been taken by the respondent. The law is clear that if the claim is for specific damages, it should be strictly proved, this is being a trite law in our jurisdiction. [See the case of **Zuberi Agostino vs. Anicet Mugabe** [1992] TLR 137(CAT) and **Peter Joseph Kilibika & Another v Patric Aloyce Mlinga,** Civil Appeal No. 37 of 2009 (Unreported). Hence, I hold that the appellant has failed to prove on the amount and value of the said goods.

Before drawing conclusion, the respondent in his reply has raised concern that the suit before the trial court was filed out of time against provisions under the Law of Limitations Act. Without referring to any specific legal provision, the respondent has suggested that the time limitation for filing this suit was 3 years. I find this contention baseless

because ***Part 1 Item 7 of the Law of Limitation Act*** [Cap.89] RE. 2019 provides for 6 years as a period of limitation for cases of this nature.

I would also point out that during trial, the framing of issues was properly done by the counsels for the parties as it appears in page 14 and 15 of typed proceedings.

In view of the foregoing, I allow this appeal to the extent that the appellant herein is awarded general damages to the tune of Tanzanian shillings Sixty Million only (TZS. 60,000,000/=), and costs of this case be borne by the respondent.

It is so ordered.

DATED at **MWANZA** this 29th day of July, 2022.

L. J. ITEMBA

JUDGE