

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SONGEA SUB - REGISTRY

AT SONGEA

PC. CIVIL APPEAL NO. 08 OF 2023

(Originating from Mbinga District Court in Civil Appeal No. 20 of 2022)

REMIGIUS BERNADO KAPINGA APPELLANT

VERSUS

RASHID RASHID MAHUPA RESPONDENT

JUDGMENT

Date of last Order: 04/08/2023

Date of Judgment: 31/08/2023

U. E. Madeha, J.

To begin with, it is important to note that this is a second appeal. Before the trial Court (Mbinga Urban Primary Court) vide Civil Case No. 68 of 2022, the Respondent sued the Appellant unsuccessfully for breach of contract which was signed between them. The Respondent claimed to be paid TZS. 11,500,000 as costs for rental fee, costs incurred in defending his rights in that suit, loss of profit and costs of paying vacant possession. Dissatisfied by the decision of the trial Court, the Respondent appealed before the District Court of Mbinga (the first appellate Court) and the

decision of the trial Court was reversed. The first appellate Court found the Respondent to have proved his claims to the tune of TZS. 7,000,000 as rental fees, costs for loss of profit and general damages incurred by the Respondent. The Appellant was ordered to pay that amount of money to the Respondent. Furthermore, the Appellant was ordered to pay the costs of the appeal. The Appellant was not satisfied with the decision and orders of the first appellate Court and he preferred this appeal on the following grounds:

- i. That the first appellate Court entertained the matter contrary to the requirements of the law of evidence.*
- ii. That the case was decided in favour of the Respondent while there was no evidence to prove the claims.*
- iii. That the first appellate Court decided the matter without considering the Appellant's testimony.*

Briefly, the factual background of this case as gathered from the original records are to the effect that; on 18th May, 2022 the Appellant and the Respondent signed a lease agreement over a house located at Plot No. 223, Mbinga Urban area. According to the signed contract, the Appellant is the owner of the house which was rented to the Respondent. The

Respondent paid to the Appellant TZS. 1,500,000 as rental fee for a period of six months. On 26th June, 2022, the Appellant issued a written notice to terminate the contract ordering the Respondent to vacate on the rented house within a period of one month.

It is undisputed fact that the Respondent adhered to the termination notice by leaving vacant possession on the rented house. After parting the rented house, the Respondent filed his claims before the trial Court claiming to be paid eleven million and five hundred thousand (TZS. 11,500,000). TZS. 1,500,000 being the costs he paid as rental fee, TZS. 1,100,000 as costs of hiring an advocate to defend his claims, TZS. 6,000,000 as general damages for disturbances incurred due to the breach of contract and TZS. 1,800,000 as costs of renting another house.

The trial Court found the claims were unproved and they were dismissed accordingly. The Respondent appealed to the District Court, in which the Court found the Respondent to have proved his claims and ordered the Responded to be paid TZS. 1,500,000.00 as rental costs, TZS. 500,000 as the loss incurred by the Respondent, TZS. 5,000,000 as general damage and costs of the appeal.

As a matter of fact, in this appeal both parties were represented. The Appellant was represented by Mr. Jofrey Sangana, the learned advocate whereas the Respondent was represented by none other than; Mr. Innocent Mbunda, the learned advocate. By consent of the learned advocates from both parties, this appeal was argued by way of written submissions.

Mr. Jofrey Sangana the Appellant's learned advocate, submitting in support of the appeal opted to submit the first and second grounds of appeal jointly. He submitted that the first appellate Court erred in law and fact when it entertained the matter which originated from Primary Court contrary to the requirement of the law. He averred that in civil cases the Respondent was to prove his claims on the balance of probabilities as it was held in the case of **Godfrey Sayi v. Anna Siame (as legal Representative of the late Mary Mndolwa)**, Civil Appeal No. 114 of 2012, in which the Court of Appeal of Tanzania had this to state:

"That it is cherished principle of law that, generally, in civil cases, the burden of proof lies on the party who alleges anything in his favour" also "It is similarly common knowledge that in civil proceedings, the party with legal

burden also bears the evidential burden and standard in each case is on the balance of probabilities."

He added that in addressing the issue of who bears the burden of proof and standard of proof in civil cases, the Court of Appeal of Tanzania in the case of **Antony M. Masanga v. Penina (Mama Ngesi) and Another**, Civil Appeal No. 118 of 2014 (unreported), the Court referred the decision made in the case of **Re B** [2008] UKHL 35, where Lord Hoffman in defining the term balance of probabilities stated that:

"If a legal rule requires a fact to be proved (a fact in issue), a Judge or Jury must decide whether or not it happened. There is no room for finding that it might happen. The law operated in a binary system in which the only values are 0 and 1. That fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by the rule that one part or other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened if he does discharge it; a value of 1 is returned to and the facts is treated as having happened."

Mr. Sangana averred further that the first appellate Court erred in law and fact in deciding in favour of the Respondent while there was no strong

evidence to prove the Appellant's claims of TZS. 7,00,000.00. Expounding his point, he stated that the Respondent failed to prove the costs of leaving vacant possession on the rented house and the rental fee of TZS. 1,500,000 was refunded to the Respondent and DW2 (Agustino Valentino Mkinga) witnessed the refund of such money.

Moreover, Mr. Sangana averred that the agreement between the Appellant and the Respondent was *void ab initio* for the reason that the Appellant had no capacity to enter into that contract over the property of the deceased person without being a legal representative (administrator) of that estate. He contended further that the house, which was leased to the Respondent is the property of Conrad Kapinga who died in 2020. He added that it is a trite law that it is only a valid contract which can be enforced.

The Appellant's advocate averred further that even if the contract entered between the Appellant and the Respondent will be treated as a valid contract, the Respondent will be liable for breach of contract because the lease agreement required the Respondent to use house for residential purposes but it was used for business activities. Lastly, he prayed for this appeal to be allowed with costs by setting aside the judgement and decree

of the first appellate Court and uphold the decision and orders made by the trial Court.

On the contrary, Mr. Innocent Mbunda the learned advocate for the Respondent, opposing the appeal submitted that the first appellate Court has a duty of making re-evaluation of the evidence given before the trial Court. To buttress his stance, he cited the case of **Kaimu Said v. Republic**, Criminal Appeal No. 391 of 2019, in which the Court referred to the decision made in the case of **Joseph Athanazi v. Makene Musimu**, PC Civil Appeal No. 4 of 2023 (unreported), in which it was held that a first appeal is in form of a rehearing and the first appellate Court has a duty to re-evaluate the entire evidence in an objective manner and arrive at its own findings.

Mr. Mbunda submitted that the first appellate Court properly evaluated the evidence given by both parties before the trial Court and reached to the conclusion that the Respondent proved his claims to the required standard and he was entitled to be paid TZS. 1,500,000 as a rental fee, TZS. 500,000 as a loss of profit and TZS. 5,000,000 as general damages. He argued that the first appellate Court being guided by the

provisions of sections 11 (1), 20 (1), 24, 26 and section 29 of the *Law of Contract Act* (Cap. 345, R. E. 2019), properly answered all the framed issues and reached into a decision it made.

Mr. Mbunda argued further that, since this is a second appellate Court, it is a trite rule of practise that the second appellate Court rarely interferes the findings of the lower Courts as it was clearly stated by the Court of Appeal of Tanzania in the case of **DPP v. Jackson Sifael Mtares and Others**, Criminal Appeal No. 2 of the 2018 (unreported). He added that since the proceedings and judgement of the first appellate Court have nothing to shows that there was misapprehension of the evidence, miscarriage of justice or violation of some principle of law or legal procedures, there is no need to disturb the decision reached by the first appellate Court.

He emphasized that it is a settled legal principle that at appellate level, the Court only deals with matters that have been decided by the lower Court. He submitted that the first appellate Court never ordered the Appellant to pay TZS. 1,800,000 as the costs of leaving vacant possession on the leased house. Also, he stated that the allegations that the

Respondent was refunded the rental fee is a new fact which was not dealt with by the lower Courts and he prayed for this Court not to pay attention on those allegations which were not proved. To cement his argument, he cited the decision of this Court in the case of **Abdallah Abubakary v. Maurus Benard Hyera**, Land Appeal No. 13 of 2022 (unreported) in which the Court profited to deal with matters which were not dealt by the lower Court.

He added that the Respondent managed to prove his claims to the required standard and the averments made by the Appellant's advocate that the Respondent failed to prove his claims are unfounded and prayed for this Court to be guided by the records of the Courts and not the averments made by the Appellant's advocate. He submitted further that Court records are serious documents and they should not be lightly impeached since they accurately signify what transpired in Court. Elaborating this argument, he cited the case of **Halfani Sudi v. Abieza Chichili** [1998] T. L. R 527. Lastly, he prayed for this appeal to be dismissed with costs and the decision of the first appellate Court be upheld.

From the grounds of appeal and the submissions made by the learned counsel from both parties, the only issue which needs the attention of this Court is whether there was a contractual relationship between the parties to the suit. On the available Court records, I have observed that there is ample evidence to prove that the Appellant and the Respondent had a lease agreement. According to "exhibit P1" which is the written lease agreement, TZS. 1,500,000 was paid by the Respondent to the Appellant as lease rent. The Respondent stayed in the rented house for only one month and the Appellant gave termination notice to the Respondent. The notice ordered the Respondent to vacate the house within one month. All these leaves no doubt that there was a contractual relationship between the parties to the suit.

As stated early herein above, before the trial Court the Respondent sued the Appellant claiming to be paid TZS. 1,500,000 as rental fees, TZS. 1,100,000 as advocate's expenses in managing his case, TZS. 6,000,000 as general damages and TZS. 1,800,000 as the costs for leaving vacant possession on the rented house. The first appellate Court found the

Respondent to be entitled to be refunded the rental fee of TZS. 1,500,000 since the Appellant breached the contract, TZS. 5,000,000 as general damages and TZS. 500,000 for loss of profit. The Court found further that the claim for costs of hiring the advocate was not properly claimed since the Respondent was to file an application for bill of costs in order to get such claims. Also, the first appellate Court found the claim for leaving vacant possession to be unproven.

Opposing the appeal, the Respondent's advocate argued that the second appellate Court cannot interfere with the concurrent findings of the lower Court. I disagree with the Respondent's advocate since it is a legal principle that the second appellate Court can rarely do so when there is a concurrent finding on both Courts. In this appeal, there were no concurrent findings. The decision made in the case of **DPP v. Jackson Sifael Mtares and Others** (supra) is distinguishable to the present appeal.

Having expounded all, as far as I am concerned, I will proceed making determination of this appeal. From inception, I find that, the Respondent is entitled to be paid TZS. 1,000,000.00 as the costs he paid as rental fee to the Appellant since the evidence in record leaves no doubt

that the Appellant was paid TZS. 1,500,000.00 as rental fee for a period of six months and the Respondent stayed in the rented house for two months and TZS. 500,000.00 was used for the two months which the Respondent stayed in the rented house.

The first appellate Court further ordered the Appellant to pay TZS. 500,000 for loss of profit and TZS. 5,000,000 as general damages. It is important to note that the lease agreement, the house was to be used for residential purpose. The Respondent in proving his claims he testified that he was using the rented house for business and the termination notice disturbed his business leading to loss of profit. On my view, I find those claims had no leg to stand since the Respondent used the rented house for business purpose contrary to what was agreed in the lease agreement.

Reversing the decision of the trial Court, the first appellate Court awarded general damages to the Respondent to the tune of TZS. 5,000,000. I am aware that, general damages are awarded by the Court in its discretion. See the case of **Tanzania - China Friendship Textile Co. Ltd. v. Our Lady of the Usambara Sisters** [2006] TLR 70. According to

Black's Law Dictionary (Abridged 7th Edition), the term "damages" is defined as:

"Money claimed by, or ordered to be paid to a person as compensation for loss or injury".

Also, the term "general damages" is defined by the same legal work as:

"Damages that the law presumes follow from the type of wrong complained of. General damages do not need to be specifically claimed or proved to have been sustained".

Therefore, general damages are granted as compensation for loss or injury incurred to the party. In this appeal, the wrong done by the Appellant was to issue one month notice of termination of lease agreement which was contrary to the terms of the contract. The lease agreement required a party to it to give two months termination notice. One of the terms of the lease agreement was for the Respondent to use the lease premises for residential purposes. In his testimony, the Respondent told the trial Court that he incurred loss in his business of which I find was improperly claimed by the Respondent since the leased house was not to

be used for that purpose. See the case of **Kibwana and Another v. Jumbe** [1990-1994] 1 EA 223, it was stated that:

"The Court, in granting damages will determine an amount which will give the injured party reparation for the wrongful act and for all the direct and unnatural consequences of the wrongful".

Thus, in granting general damages Courts are bound to consider to what extent the complainant has incurred loss or injury. In this appeal in granting general damages, the first appellate Court assigned no reason in awarding TZS. 5,000,000 as general damages. I find that since the first appellate Court was in a view that the rented house was use for business purpose that is why it granted such amount of money as general damages. That occasioned due to improper evaluation of evidence. Since the contract was for the rented house to be used for residential purpose, I find the Respondent is entitled to general damages at the tune of TZS. 500,000 only.

Eventually, I hereby order the Respondent to be paid by the Appellant TZS. 1,000,000 as costs paid in the lease agreement and TZS. 500,000 as general damages. The appeal is hereby partly allowed to the

above extent. The Appellant is ordered to pay the costs of this appeal.
Order accordingly.

DATED and DELIVERED at **SONGEA** this 31st day of August, 2023.




U. E. MADEHA

JUDGE

31/08/2023

COURT: Judgment is delivered in the presence of both parties and Mr. Alex Nyoni holding brief for Mr. Jofrey Sangana, the Appellant's counsel. Right of appeal is explained.




U. E. MADEHA

JUDGE

31/08/2023