

TANZANIA / JUDGMENT

access bank tanzania ltd vs ashif fatehal ladhani ltd 2022 tzhc 14123 25 october 2022

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (IN THE DISTRICT REGISTRY)
AT MWANZA CIVIL APPEAL NO. 45 OF 2021 (Originating from the Judgment and Decree of the
Resident Magistrate's Court of Mwanza at Mwanza in Civil Case No. 72 of 2019) ACCESS BANK
TANZANIA LTD..... APPLICANT VERSUS ASHIF FATEHAL LADHANI
LTD..... RESPONDENT

JUDGMENT

5th & 25th October, 2022 DYANSOBERA, J.: This appeal assails the judgment of the Court of a Resident Magistrate at Mwanza in Civil Case No. 72 of 2019 delivered on 10th day of June, 2021 dismissing the appellant's claims in her plaint and granting the respondent's counter claim. Aggrieved, the appellant has preferred this appeal. A total of four grounds of appeal have been set out by the appellant in her Memorandum of Appeal filed on 1st September, 2021 as follows: -

- (i) That, the learned trial Magistrate erred in law and in fact for failure to undertake proper interpretation of the clear terms of the contract concluded between the parties and misdirecting himself by venturing on irrelevant issues and or extraneous matters. i (ii) That, the learned trial Magistrate erred in law and in fact by expunging the Appellant's evidence which is exhibit P4 and P5 un procedurally thereby occasioned injustice to the appellant. (iii) That, the learned Magistrate erred in law and fact by not considering the wight of evidence adduced by the Appellant's witnesses. (iv) That, the learned trial Magistrate erred in law and in fact by entertaining a counter-claim in favour of the Respondent without abiding to the procedures governing such counter claim. With these grounds, the appellant prays that this appeal be allowed with costs, judgment and decree of the Resident Magistrate's Court of Mwanza at Mwanza be quashed and set aside and consequently, the Respondent be ordered to pay USD 21,000 being unutilized money in respect of the lease agreement concluded between the Appellant and the Respondent. Any other relief(s) are also asked for. Before delving into the determination of the appellant's grounds of appeal, a recapitulation of the facts leading to this appeal is apposite. The appellant and respondent entered a 10 years'term lease agreement with the terms and conditions stipulated therein. The appellant was the tenant or lessee while the respondent was the landlord or lessor. In 2 that agreement which was exhibited as P 1, one of the terms of the lease agreement was that

the tenant could terminate the lease by giving six months' notice of the intention to terminate the agreement and that the termination would be effective after the expiration of the said term. Exercising that right, the appellant issued a notice to the respondent of her intention to terminate the lease agreement. The notice was effective from 1st December, 2018 to 31st May, 2019. On 30th July, 2019, the appellant instituted a suit under summary proceedings against the respondent claiming, inter alia, payment of United States Dollars 21, 000 being unutilized money in terms of Clause 7:2:3 of the lease agreement entered into between the plaintiff (appellant) and defendant (respondent) on 4th day of September, 2012, general damages, costs, interests and for an order for attachment of the respondent's properties. In resisting the claims after the grant of leave to appear and defend, the respondent also filed a counter claim against the appellant seeking payment of unpaid amount of USD 10, 500 VAT exclusive, per month from 1st August, 2019 to the time the suit premises shall be vacated. The same respondent claimed as well, interest at 20% per month of unpaid amount from 1st August, 2019 to payment in full and costs of the suit. 3 In proof of their respective suit and counter claim before the trial court, the appellant called four witnesses and tendered some documentary evidence while the respondent called two witnesses and had also some documentary evidence produced. At the end of the trial, the learned Resident Magistrate dismissed the appellant's suit but allowed the counter claim and granted the reliefs the respondent had asked for. During the hearing of this appeal, the appellant was represented by Messrs. Patrick Suluba Kinyerero and Amadeus Malya, both learned Advocates whilst Mr. Julius Mushobozi, learned Counsel, stood for the respondent. In support of the appeal, Mr. Kinyerero and his fellow advocate undertook to argue the grounds of appeal as they appear. Submitting in support of the 1st ground of appeal, Mr. Kinyerero contended that the appellant is complaining that the trial magistrate erred in law and in fact for failure to undertake proper interpretation of the clear terms of the contract concluded between the parties and misdirected himself on irrelevant issues or extraneous matters. According to Mr. Kinyerero, the crucial issue for determination on this ground is whether the appellant was entitled to be paid USD 21, 000 as unutilized rent. Relying on Clause 7:2:3 of exhibit P 1, he contended 4 that the appellant was, upon termination of the contract and expiration of the issued six months' notice, the appellant was entitled to the that sum of USD 21, 000. He further contended that as per the proceedings of the lower court, the total of USD 126, 000 was paid annually on 1st August, 2018 to 31st May, 2019 for which USD 10, 500 was paid monthly hence making a total of USD 126, 000. He insisted that the Clause was very clear, did not need extraneous source of understanding it and that parties to the contract were bound by the terms of the contract and were obliged to perform their respective promises. To buttress his argument, Mr. Kinyerero relied on Section 37 of the Law of the Contract Act and the case of Mariam E. Maro v. Bank of Tanzania, Civil Appeal No. 22 of 2017. In this ground of appeal, the finding of the trial Magistrate that under the lease agreement it was agreed by the landlord and the tenant that the rent payment shall be on the annual basis and that there was no term under the lease agreement for the rent to be paid in monthly basis was also challenged. In response to the submission on this first ground, Mr. Julius Mushobozi, learned Counsel insisted that the ground has no merit. It was

his argument that the appellant's Counsel referred to Exhibit Pl and faulted the trial court for holding that throughout the contract there was 5 no monthly term but the same counsel could not show this court the clause that reflects the existence of monthly term. Counsel for the respondent observed that throughout the proceedings, no witness from either side testified that the rent was payable on monthly basis. He affirmed that the whole evidence indicated that the contract was for ten years and the rent was to be paid on annual basis at the rate of USD 10500 per month. The court was referred Clauses 2.1, 3.2, 7.2 and 7.2.2 of exhibit Pl and the evidence of Pw3 at page 33 as reflected at the first paragraph. Subscribing to the decision of Mariam E. Maro v. Bank of Tanzania, Counsel for the respondent pointed out two terms are provided in the contract. 10 years term and the annual term (12 months term). He clarified that from 2012 when the contract was executed 10 years term was to expire in 2022 but even if the court considers the annual term from the last annual rent pay the twelve months term could expire on 31st July 2019 according to proceedings and exhibit Pl. Counsel for the respondent was confident that the appellant had no claim against the respondent. Refuting the respondent's claim that he was entitled to unutilized rent of UDS 21, 000, Counsel for the respondent maintained that such 6 claim is unfounded as the appellant utilized all the rent taking into account that they are still in that building up to now. On the handing over the keys by the appellant and the respondent's refusal to accept them, it was submitted on part of the respondent that the keys were sent to respondent after the matter had been instituted in court on 30.7.2019 by way a summary suit and after the respondent had filed the application for leave to appear and defend on 2nd September, 2019 complaining for not having been handed over the premises, that the appellant had never vacated and had never removed all fixtures and properties from that building implying that the appellant was and still is with the up to now. According to Mr. Mushobozi, the sending of that person to hand over the keys to the respondent was to pre-empt the appellant's claims considering that the annual rent term was expiring on 31st July, 2019. He rested his submission on this ground by challenging the credibility of the appellant's witnesses and observed that there was no tangible evidence to prove that the appellant handed over the suit premises to the respondent. As rightly submitted by Mr. Patrick Suluba Kinyerero, the main issue calling for determination in this first issue is whether the appellant 7 was entitled to unutilized rent of USD 21, 000 for the months of June and July, 2019. In determining this issue, the learned Resident Magistrate, at page 6 of the copy of the judgment, had the following to say: - "It follows therefore that, the plaintiff cannot be heard claiming for USD 21,000 as unutilized rent while there is ample evidence that his assets are still in the building, in that regard no proof as to when the said demised property was handed back to the landlord by the lessee. This is to say the claimed two months' rent after expiration for the six months' notice by the plaintiff to the defendant has no meaning, so long the plaintiff is still in possession of the keys to date. Following the above situation, the plaintiff cannot institute a case against the defendant mean while he is in possession of the keys of the said house, the institution of the said civil case was made illegally and unfairly." With unfeigned respect, the finding of the learned Resident Magistrate on this issue cannot be faulted. It was amply demonstrated in evidence that the appellant, although she issued a six months' notice

as stipulated under Clause 7:2:3 of the lease agreement (exhibit P 1), 8 the same appellant has not, to date, vacated the premises and handed over them together with the keys to the respondent. I will explain. First, the evidence of the appellant's witnesses which supports the respondent's version was clear that the appellant is still retaining the keys to the building on account that the respondent refused receipt thereof. For instance, PW 1 one Edward Muhando Noel, then branch manager, told the trial court that the handing over of the suit premises did not go smoothly. The same witness admitted at page 25 of the typed proceedings of the trial court, hereinafter to be referred to 'the proceedings', that the respondent has no access to the building. He also admitted that he was not present during the handing over of the building. The same applied to PW 2 one Hezron Malya who, at p. 28 of the proceedings, he testified that: - "After two days, on 2nd June, 2019, we handed over the keys I was with Noel Mhando and the lawyer Amos Gondo but the defendant denied to receive the keys without reasons. We then proceed to insist the defendant to receive the keys" Anita Msaongo who testified also for the appellant as PW 3 told the trial court that the Bank officers took the key to the defendant but the defendant refused to accept them. Likewise, PW 4 one Latini Christopher Kimdanka testified at page 35 of the proceedings as follows: 9 'I took the keys to the office of the defendant but he refused and we cannot force the person to receive the keys and I then returned the keys to the place where the luggage comes' Second, the appellant is still maintaining her security guards at the suit premises hence supporting PW 1's evidence that the respondent has no access to the said premises. Third, the appellant's assets and furniture are still in the suit premises. Fourth, is the reluctance of the appellant to have the locus in quo visited and the building opened. This is clear at page 38 of the proceedings where the learned Advocate who was representing the appellant at the trial was giving inconsistent and unintelligible remarks. The Advocate Happiness is, at page 38 of the proceedings, recorded to have stated as follows: 'According to the order of the court to visit the locus in quo (building), which emanates from the defendant's counsel, we agree with the order of the court to visit the building but we object the opening of the building. We are no longer a tenant in that house since 3/6/2019, any attempt to open the house amounts to trespass. Thus, the order of the court be executed by the court broker, and the Access Bank io (plaintiff) will give the keys to the court broker. But also pray the costs of the court broker and be paid by the party seeking or applying to visit, I humbly submit. What a misguided submission by a lawyer! Fifth, the evidence depicts the absence of clear proof, albeit in writing by way of a written note, of the handing over of the suit premises by the appellant to the respondent for, according to the lease agreement (exhibit P 1), parties had inserted clauses of not only terminating their lease agreement but also the mode of the termination. Clause 7:2 stipulated that either party herein may terminate this Agreement prior to the expiration of initial period of ten years under the prescribed manner. Clause 7:2:3 provided that the tenant may terminate this agreement by giving six months' notice of the intention to terminate to the Landlord and termination shall be effective after expiration of the said term. There is no dispute that the prerequisites of the lease agreement provide for the lessor's obligation to transfer possession of the property to the lessee at the beginning of the lease and the right of reversion of possession of the

property to him at the termination of the lease. In other words, the effect of termination of lease agreement is the ceasing of the rights, title and interest of the lessee under the lease agreement ii and the lessee's obligation to put the lessor into the possession of the property. In the case under consideration, as rightly found by the trial court, it was not proved, on balance of probabilities, that the appellant surrendered to the respondent and the latter took possession of the suit premises. This means that the appellant is still in possession of the suit premises unlawfully. The logical conclusion is that it is the appellant who is the breaching party. That being the case, he is not entitled to any rent as there is no unutilized rent owing to the fact that the appellant has not yet fulfilled her legal obligation of handing over the suit premises to the respondent and the respondent has not enjoyed her legal right of taking possession of the same. The appellant's claims in his suit were rightly dismissed for want of legal merit. The first ground of appeal falls away. In the second ground of appeal, the appellant is faulting the trial court's overruling the respondent's objection on the admissibility of exhibits P 4 and P 5, subsequent admission and the ultimate expunging thereof. It is argued on part of the appellant that the expunging of the appellant's evidence which was in exhibits P 4 and P 5 was against the procedure and occasioned injustice and further that the trial court, by overruling the objections, admitting the said exhibits but then 12 expunging them from the record, committed a serious error as it was already *functus officio*. In responding to this ground, Mr. Mushobozi supported the trial court's expunging the exhibits P 4 and P 5 for non-compliance with Section 18 of the Electronic Transactions Act, it being electronic evidence. He argued that a document must be authentic, realistic, accurate enough to trace the audit trail of how it was originated, stored, communicated, maintained, retrieved and how the originator may be identified. He supported his argument by citing some case laws. The learned advocate, however, faulted as well the procedure adopted by the learned Resident Magistrate. He contended that after the documents had been admitted, they ought not to have been expunged, rather, they had to be accorded no weight if the evidential value was doubtful. He invited this court to enter into the shoes of the trial court and do what was supposed to be done. Having considered the submissions of Counsel for the parties, I am in no doubt that the learned trial Resident Magistrate erred in expunging the said exhibits. Since he had overruled the objection as to their admissibility and had admitted them in evidence, he lacked power to expunge them from the record as he was, to borrow the words of Counsel for the appellant, "*functus officio*". I thus adopt the course 13 suggested by Counsel for the respondent, quash and set aside the trial court's order of expunging exhibits P 4 and P 5 from the record and restore them to be part of evidence. Notwithstanding their being restored, no weight will be accorded to them because, apart from failure to satisfy the legal requirements under Section 18 of the Electronic Transactions Act, the same documents do not support the appellant's case. This is so because the said documents could not imply or show what the appellant and his Counsel argued that the appellant had vacated the building and the same building was free for rent and the respondent was inviting tenants to rent the premises. This is so because that implication would be contrary, contradictory to and inconsistent with the evidence of the appellant's witnesses that the appellant had not surrendered the suit premises to the

respondent and the latter had not taken possession of them those exhibits had, to say the least, evidential value. The second ground of appeal lacks merit. The appellant's third ground of appeal is that the evidence adduced by her witnesses were not considered. In support of this ground, Counsel for the appellant argued that the evidence of PW 1, PW 2, PW 3 and PW 4 had proved the issues raised by the court. Counsel for the respondent was in opposition of this argument. But what were those issues? According to the record of the trial court, at pp. 6 and 7 of the proceedings, the framed issues were the following: -

1. Whether the defendant breached the lease agreement dated 4th September, 2012 or rather, who breached the lease agreement.
 2. Whether the notice of intention to terminate the lease agreement was legally issued to the defendant
 3. Whether the plaintiff was entitled to be refunded unutilized rent of USD 21, 000 upon expiration of the notice period
 4. Whether the plaintiff handed back the suit premises to the defendant and
 5. To what reliefs are the parties entitled. With respect to the respondent's counter claim, the following two issues were framed by the trial court: -
 1. Whether the defendant in the counter claim is indebted of USD 10,500 each month from 1st August, 2019 to-date
 2. To what reliefs is the plaintiff entitled.
- 15 The next question is on how the trial court determined the issues, particularly those pertaining to the plaintiffs. Going by the trial court's copy of judgment at page 4, the learned Resident Magistrate observed and I quote:- 'This court has not been properly convinced by the evidence of the plaintiff side to when the demised premises were handed back to the defendant. While the plaintiff asserts to have handed over on 3rd June, 2019, the defendant denied to have received the same. It is trite law that he who alleges must prove' The learned Resident Magistrate supported his argument by making a reference to Section 110 (1) of the Evidence Act. He concluded that the appellant had failed to prove to have handed over the suit premises to the respondent on the alleged date. Furthermore, the trial court was clear that when an attempt was made to have the suit premises visited to ascertain whether or not there were some assets of the appellant in the premises, the appellant was reluctant. Besides, the learned Resident Magistrate was satisfied that there was no proof that the keys to the building were handed over to the respondent. 16 After considering all this evidence, the learned Resident Magistrate came to the finding that there was no breach of contract on part of the respondent. Indeed, this was in accord with the evidence the parties had adduced before him. The appellant's complaint in the 3rd ground of appeal that the learned Magistrate erred in fact and in law by not considering the weight of the evidence adduced by the appellant's witnesses in proof of the issues is devoid of any merit. Now on the 4th ground of appeal. It is the appellant's complaint that the learned Resident Magistrate erred in law and in fact by

entertaining a counter claim in favour of the respondent without abiding to the procedures governing such counter claim. According to Mr. Kinyerero, the crucial issue in this ground is whether the respondent's counter claim was determined or prosecuted by the respondent/plaintiff. In his view, the counter claim has the effect of a cross suit and that the court can pronounce final judgment both on the original claim and counter claim. He argued that the issues in respect of the original suit and the counter claim were framed as indicated at pp. 6 and 7 of the proceedings. That following the framing of issues on both the plaint and counter claim, those issues ought to have been determined separately. He admitted that there was an ex parte order against the appellant to 17 the counter claim. Mr. Kinyerero further submitted that at p. 7 of the trial court's copy of judgment, the trial Magistrate said that, 'but in the absence of any reply to the cross suit, the counter claim was heard ex parte as the defendant in the cross suit never filed his written statement of defence. However, the counter claim was heard in the presence of the defendant, judgments of both the main suit and cross suit were pronounced on the same date in the presence of the parties and their advocates'. It is the appellant's complaint that the court proceedings do not show that the counter claim was heard and determined and that the framed issues were not determined and this, Mr. Kinyerero argued, rendered the judgment defective. He relied on the case of Stanbic Bank Tanzania Limited v. Trust Engineering Work Limited, Civil Appeal No. 374 of 2019 to support his argument. Supporting Mr. Kinyerero's submission on this ground, Mr. Malya faulted the learned Resident Magistrate for using dead law. According to him, the power of the trial court was centered on 0. VIII rule 14 (1) of the Civil Procedure Code. Mr. Malya, however, argued that principally, the cited law is non-existent. He explained that 0. VIII rule 14 (1) of the Civil Procedure Code was amended by the Government Notice No. 381 of 2019 which amended and repealed Government Notice No. 422 18 of 1994 and that the GN No. 381 of 2019 is the correct law and that pronouncing judgment was not what the current law provides. In fine, Mr. Malya urged the court to find that USD 10, 500 was awarded to the respondent without specific proof and without it having specifically proved. Replying to this ground, Mr. Mushobozi, at first, brought to the attention of this court on the provisions of rule 11 (1) of Order VIII of the Civil Procedure Code that the appellant did not file written statement of defence to the counter claim and that by virtue of that rule, the appellant did not dispute the counter claim. He argued that for purposes of expedience, the main suit and counter claim were decided together. He elaborated those two issues had been framed and the respondent, through his two witnesses, adduced the evidence both testimonial and documentary and proved those issues. The trial court, in its judgment, considered and determined both issues. Counsel for the respondent was also emphatic that the evidence the respondent adduced was not shaken by the appellant and that there is no basis for the appellant to come to this court to challenge what he did not dispute. As to the cited case of Stanbic Bank Tanzania Limited v. Trust Engineering Work Limited, it was submitted on part of the respondent that it is distinguishable and should not bind this court. 19 I have considered the submissions of the learned Counsel on this fourth ground. I am inclined to hold that the appellant and his two advocates are strange to the truth. There is no dispute that the counter claim was heard ex parte after the appellant defaulted complying with the

law. At that stage, the claims in the counter claim stood unopposed. As rightly contended by Mr. Mushobozi, the respondent called two witnesses who not only gave their testimonies but also produced documentary exhibits to turn the table on the appellant by bringing up more issues in the case and demanding the legal redress. According to the pleadings and evidence, the facts to prove the counter claim referred to the same event which gave rise to the appellant's cause of action, that is the termination of lease agreement. Since the counter claim arose from the same transaction or occurrence on which the plaintiff was suing, the cause of action was compulsory and not permissible. The trial court, in my view, committed no wrong in hearing both the main suit and the counter claim together and determine them on the same day. As the evidence reveals, the counter claim was heard as evidence by the respondent's evidence particularly that of DW 2. The same counter claim was also determined according to law as clearly shown in the judgment of the trial court. To be precise, the learned Resident Magistrate, in his judgment had the following to observe: "This court finds that the counter claim emanates from the lease agreement executed by both the plaintiff and the defendant and the plaintiff was aware of the said cross suit and was involved in the framing of issue, was required in law to file a reply within the specified period of time, both issues were framed on 17th day of August 2020, since then to the closure of the main case there was no any reply to counter claim by the defendant (plaintiff in main case), in absence of any reply to the cross suit the counter claim was heard exparte as defendant in cross suit never filed his written statement of defence. However, the counter claim was heard in presence of the defendant and the judgment of both main suit and the cross suit were pronounced on the same date j^in presence of both parties and their learned advocate. It was long ago in the case laws, for instance in the case of Joe RM. Ruqarabamu vs. Tanzania Tea Blenders Ltd, (1990) TLR No. 24, that ..." Failure to file reply to counter claim within 21 days contravenes ORDER viii Rule 2 of the Civil Procedure Code Cap. 33 R.E. 2019..... " Earlier on, the learned Resident Magistrate had the following to say: 21 "This court finds that the counter claim emanates from the lease agreement executed by both the plaintiff and the defendant and the plaintiff was aware of the said cross suit and was involved in the framing of issue, was required in law to file a reply within the specified period of time, both issues were framed on 17th day of August 2020, since then to the closure of the main case there was no any reply to counter claim by the defendant (plaintiff in main case), in absence of any reply to the cross suit the counter claim was heard exparte as defendant in cross suit never filed his written statement of defence. However, the counter claim was heard in presence of the defendant and the judgment of both main suit and the cross suit were pronounced on the same date bin presence of both parties and their learned advocate. It was long a go in the case laws, for instance in the case of Joe RM. Ruqarabamu vs. Tanzania Tea Blenders Ltd, (1990) TLR No. 24, that ..." Failure to file reply to counter claim within 21 days contravenes ORDER viii Rule 2 of the Civil Procedure Code Cap. 33 R.E. 2019..... " In the absence of the evidence rebutting what the respondent claimed and testified in her counter claim, it is preposterous to argue, as the appellant and his Counsel do, that the claims in the counter claim 22 were not proved and determined. The citing of the old and repealed law was, in the circumstances of this case, inconsequential to the merits of the determination on

the counter claim as the matter was decided according to the evidence and the law. As was the trial court, I also find that the respondent's claims in the counter claim were pleaded and proved and the proof was on balance of probability, the standard required in civil cases. This 4th ground of appeal also crumbles. The upshot of this is that the appeal fails and it is dismissed with costs to the respondent. The judgment of the trial court is endorsed. Judge 25.10.2022 This judgment is delivered under my hand and the seal of this Court on this 25th day of October, 2022 in the presence of Mr. Patrick Suluba Kinyerero, learned Counsel for the appellant and in the presence of Mr. Ashif Ladhani, the respondent's Director. Aleem Alibhai, the P. Officer. W.P. Dyansooera Judge 23

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