

TANZANIA / JUDGMENT

NA TZHC Dar es Salaam

COURT
TZHCDECIDED
1 January 2011

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IN THE HIGH COURT OF TANZANIA (COMMERCIAL DIVISION) AT DAR ES SALAAM
COMMERCIAL CASE NO.12 OF 2011

1. MAENDELEO HOTEL AND RESTAURENT(1981) LTD ... 1sr PLAINTIFFF
2. JEREMIA J. BURETA..... ND PLAINTIFF VERSUS NATIONAL
HOUSING CORPORATION DEFENDANT

JUDGMENT

{30.04.1014 & 19.05.2014} Nyangarika J. The 1st plaintiff in this suit is a limited liability company incorporated and existing under the laws of Tanzania. The 2nd plaintiff is an individual natural person residing and living for gain in Dar es Salaam. The defendant is a body corporate established under the National Housing Corporation Act, 1990. . T.he former claims jointly and severally against the latter for damages, loss arising out of breach of a lease agreement, unlawful eviction from the suit premises known as Plot Page 1 of 4 22/25 Apartment 001 situate along Livingstone/Mchikichini street, Dar es Salaam and for unlawfully confiscated of properties from the said suit premises there from. The facts as gathered from the pleadings are that the first plaintiffs and the defendant are tenant and landlord, respectively, by virtue of the lease agreement signed between them on 13/2/2009. The 2nd plaintiff became a sub tenant of the defendant after the first plaintiff was permitted by the defendant to sublease vide a consent letter and lease of sub tenancy. Thereafter 2"d plaintiff since then started to occupy the premises and run a hotel and bar business. On the 11/1/2011, the said premises were stormed without any notice whatsoever by a group of persons who introduced themselves as having instructions of the defendant run down the business and took some assets and locked some of them inside the premises. It is claimed further that such actions exposed both plaintiffs to great loss of business and damages. It is for this cause that the plaintiffs pray that

- (a) The defendant be compelled to specifically perform the lease agreement and sub lease agreement
- (b) The defendant pays the plaintiffs general damages as may be assessed by this court ~ Page 2 of 14

- (c) The defendant pays specific damages which could otherwise have been earned if the business had not been stopped.
 - (d) The defendant pay exemplary damages as may be assessed by this court
 - (e) Costs for this suit and interests thereon at 12% from the date of the suit till full and final payment. In her written statement of defence, the defendant denies the allegation of wrongful eviction and says that the action taken was due to nonpayment of rent by the plaintiffs. It is stated further that the plaintiffs were issued with a notice of intention to determine the lease for nonpayment of rent amounting to TZS 6,212,365 on 4/6/2010 but they did not pay heed to it until at the time of eviction. Therefore, the plaintiff was in arrears of rent amounting to TZS 6,212,365 but in reply thereto, the plaintiffs refuted the allegations of being bad tenants and instead alleges that they were paying rent and that all late payments were penalized and the defendant, .. J. has all along been collecting and enjoying such penalties of which the last penalty amounting to TZS 26,329.25 was paid as of February, 2011. IOt is stated that there was no breach of any terms as to payment of rent at the time of eviction (January, 2011).
1. Much as I reckon the issues proposed by the counsels for both parties, I find the issues for determination by this Court to be;-
 - i. Whethe, the,e was a tenancy agreement between the parties - , L ~f14 ii. If the first issue is answered in the affirmative, whether there was any breach by either of the parties iii. To what reliefs if any are the parties entitled?
 2. The first witness for the plaintiff was one Mr. Michael Massengi, a 62 years old adult Christian. His testimony goes thus; he is a tenant of the defendant since
 1981. He tendered a Lease Agreement (Exhibit P.1) to exhibit his tenancy. He told this court that the tenancy was for two years renewable term and the one tendered run from 30/9/2009 to 30/9/2011. He went on to aver that due to sickness he sought for consent from the defendant to sub lease the premises to another person and the defendant vide a consent letter (exhibit P.2) and sublease Agreement (Exhibit P3) allowed him to do so. Regarding rent it was his testimony that he used to pay 868,200/ but after subleasing it was raised up to Tshs. 1,303,300/=. It is his testimony that he never heard anything about the suit premise until when he heard that the 2nd plaintiff was locked out. On cross examination it was his testimony that the duty to pay rent was still upon him after subletting. He said that the subtenant used to pay him 1,400,000 which he submitted to the defendant. He went on to say that at the time of eviction he was in arrears of about Tshs. 3 million which was paid after eviction.
 3. Pw.2 was one .James Bureta, He ·said that his relationship with the defendant is based on the permission given to him by the defendant for renovation of the suit Page 4 of 14 premises (Exhibit P4), renovation which cost him TZS 17 Million. He went on to tell this court that after the renovation he opened up a Restaurant business in

2009. Regarding payment of rent, it was his averments that he used to pay through one Mr. Michael Maendeleo (the First owner of the first plaintiff business) because he was still the legal tenant of the defendant. He stated further that since Mr. Maendeleo was not remitting the rent to the defendant properly and timely, he decided to write to the defendant asking for a lease of the same premise so that he could pay the rent properly. It was his testimony that the defendant together with Kimbembe Auction mart visited his premises and advised him to clear rent arrears which he did comply by paying a total of TZS.6,455,000/= together with a penalty for late payment which he paid to the said Kimbembe Auction Mart (Exhibit P.7). He continued to tell the court that after payment of the penalty, he continued with business as usual until January 2011 when the defendant and other people stormed his office in his absence, took some property and locked the premises. It is his averment that after the event, he visited the defendant's office, demanded his bill and cleared all his debts. He went on to tell this court that the defendant never gave him reply to his application to lease the premise and he was evicted without being given any notice. Page 5 of 14. On cross examination it was his testimony that he did not know what Kimbembe Auction mart were doing at his premises on the day he was evicted. Upon being referred to exhibit P4 he said that he had paid penalty for delayed payment of rent. He told this court that he went to pay the arrears after eviction because previously he was in bad financial position. Regarding the duty of the first plaintiff, it was his averment that it was his duty to pay the rent and further that he (first plaintiff) was the one who maintained a contractual relationship with the defendant. He told this court that because of the first plaintiff's failure to pay rent timely and properly he decided to apply for lease himself, application for which he never got a reply from the defendant save for the letter instructing him to wait until investigation on the existing tenant is made. Upon being asked on the contract between him and the first plaintiff, it was his averment that there was no contract except for the consent letter from the defendant authorizing the first plaintiff to sublease the premises. He went on to tell the court through cross examination that it was because of nonpayment of the rent by the first plaintiff that the defendant evicted him and the reason they came to court. One Mr. John Salim, the first defense witness (herein DW1) is an employee of the first defendant in the capacity of House Officer. Regarding the relationship between the Plaintiff and the first defendant, he told this court that it was that of tenant and landlord, whereby the plaintiff had failed to pay rent. . issued a 30 days' notice of the intention to terminate the lease to the plaintiff where after the defendant instructed Kimbembe auction mart to issue 14 days' notice to the plaintiff before evicting him from the premises. As to the status of the second plaintiff, it was his testimony that he was the defendant's subtenant. On cross examination, it was his further testimony that the second plaintiff was also a legal tenant of the defendant by virtue of the permission to sublet the premises given by the defendant to the first plaintiff. As to the notice of intention to evict the plaintiff, it was his testimony that the notice was issued to the first plaintiff who was the principal tenant. He averred that the eviction was due to failure to pay rent. Regarding the plaintiff's property, it was his testimony that the same were still in Kimbembe Auction mart's custody. DW2 was one, Ngalizi Zacharia Mtilombo, who identified himself as the Estate

Officer in the defendant corporation. His statement was that the defendant issued thirty days notes of the intention to terminate the tenancy after the plaintiffs' failure to pay the rent arrears. Page 7 of 14 Having carefully gone through the evidence of the parties, I will proceed to deal with the issues framed by this court seriatim. The first issue is whether there was a Tenancy Agreement between the parties? As between the first plaintiff and the defendant, this issue must be answered in the affirmative onset. The testimonies of PW1, PW2, DVV1 and DW2 points in congruency to the existence of the tenancy agreement as between the two. Exhibit P.1 which is a Commercial Lease between the Defendant and Maendeleo Hotel& Restaurant (1981) Ltd entered into on 13th day of February, 2009 further exhibits this fact. Accordingly, without much ado, the issue is also answered in the affirmative as between the second plaintiff and the defendant. It is undisputed that the first plaintiff, through Exhibit P.2 was permitted by the defendant to sub let the suit premise. DW1 and DW2 testified to this fact that the second-plaintiff was their tenant vide the action of subletting. The conduct of business as between the duo also manifestly implies existence of a tenant and landlord relationship. For instance, exhibit P.4 shows that the second plaintiff was allowed by the defendant to undertake renovation of the suit premises. Having found in the affirmative for the first issue, I proceed to the second issue as to whether there was any breach of the lease by either of the parties. To answer this issue, it is pertinent that the question as to whether there was nonpayment of rent or not is crucial. ~ Page 8 of 14 . PW1, on cross examination stated that he was primarily responsible for remission of rent to the defendant. According to him, he used to collect the rent amounting to T.shs. 1,400,000.00 from the sub tenant and was remitting the required rent fee of Tshs. 1,302,600 to the defendant as landlord. He consented also that up until eviction, he was in arrears of about Tshs. 3 Millions. PW2 collaborated that statement by saying that he used to pay the rent monies to the first plaintiff who was supposed to remit the same to the defendant. However, upon realization that the first plaintiff was not remitting the rent monies timely and in full amount, he decided to make an application to the defendant in order to become principal tenant of the same premises so as to avoid further disturbances from the first plaintiff. However, as far as the issue of arrears at the eviction time, it was his contention that after being visited by Kimbembe Auction mart he was advised to clear the rent arrears which was in tune of Tshs,6,465,000 which he did vide Exhibit P.6 together with penalty charges(Exhibit P.7). According to exhibit P.6, the total amount due to the defendant was Tshs. 8,028,364.5, whereby the defendant discharged only Tshs. 6,465,000. It was his testimony that after making such payment, business went on as usual including payment of penalties until when he was invaded by the defendant's agents for eviction on the 11/1/2011. He also recounted that after the eviction he preceded to the defendant's Bills departments, asked for his bills and discharged the same. This collaborates PW.1's statement that he ~ Page 9 of 14 .. -----' discharged the arrears in the tune of Tshs. 6 Million. I Note here with emphasis that this payments were made, according to the testimony of PW2, after the eviction exercise took place. It was also not contended between the parties that late payment of the rent by the plaintiffs, according to PW2, DW1, and DW2 was an order of the day hence the regular penalty charges. In this

regard, PW2 and PW1 agree in principle that it was such failure to clear up the said rent which justified the defendant's eviction, Now, what can be said of such trend of events and conduct of these parties in relation to their tenancy agreement? I gather from clause 2 of the Main Lease Agreement that a The Rent sh~II be payable monthly/annually in advance O!) the first day of each and every succeeding month/year during the term of this agreement, the first such . installment beconiing payable on the 1s1 day of EVERY MONTH ... n. It was further covenanted by the tenants (plaintiffs) under clause 3(a) of the same agreement that they will pay during the term of lease the rent punctually on the days and in the manner agreed without any deductions whatsoever. According to clallse 2 of the Lease Agreement for Sub-tenancy in business premises (Exhibit P.30, this provision applied Mutatis Mutandis to the sub tenancy relationship. The penalty charges paid re.gularly by the plaintiffs together with admission of the fact that the moneys paid to the defendant in clearance of the 6,465,000 arrears to say the Page 10 of 14 . " least tells it all that the plaintiffs were in breach of the above quoted clauses of the agreement. Pw .2 unequivocally reiterates this by admitting through cross examination that it is the failure to pay the rent timely by the first plaintiff which has led the parties to come to . court (see page 4 7 of the transcribed hearing of 27 th November, 2012). At this juncture, suffice to evaluate the defendant's actions after failure by the plaintiff to comply with payment terms. It is undisputed that the defendant presented a bill as arrears payable to the plaintiffs on the 1st August, 2010 which was responded to on the 3rd August, 2010 by the plaintiffs depositing a total of Tshs.6,465,000 as part payment of the total arrears. Thereafter, it is on Pw2's testimony that business continued as usual until the intrusion by the defendant's agents. Thus, the plaintiffs contend that they were .. .; not notified as the law requires on the intended termination of the lease agreement and the tenancy thereof. The defendants denied this allegation but unfortunately did not adduce any evidence, say a copy of such notice in this Court. NOW the question to be asked is whether this was a breach of the contract rendering the eviction Illegal forms, the subject of my subsequent analysis. Under clause 5(b) of the Commercial Lease Agreement between the parties (Exhibit P.1), it is provided that the lease may be determined by either the Tenant or the Landlord by giving one month's notice to the otherfparty. Clearly termination wflhout g;vng notice to :h• o t h e r J party constitutes a breach o this proviso which is part o their agreement. ~ { . !Page 11 of 14 The thorniest issue is, does this put the parties on equal footing as far as breach of the tenancy agreement Is concerned? I think not. Upon further and better scan of the said agreement I landed on clause 5(c) of the tenancy Agreement between the parties. It is provided thus "the Corporation may determine the Tenancy If the Tenant fails to pay the rent hereby reserved or the rent falls in arrears for the one month or fails to comply with any of the covenants herein specified without further notlce. (underlining is mine). It is undisputed that the plaintiffs were fully aware of the existence of arrears at the time of said eviction. This awareness is inferred from the Exhibit P.6, which shows the total amount due by 1s1 August, 2010 and the amount discharged by 3rd August, 2010. Further, there are statements by Pw2 that, upon eviction and lock out by the defendant, he knew it was due to none other reason than the rent arrears (see page 39

paragraph 2 of the transcribed the hearing proceedings of 27 th November, 2012). The net result of such circumstances, in line of the above quoted clause 5(c) is what differentiates the parties in regard to breach of the Agreement. The plaintiffs, having been in arrears, and being aware of the said clause cannot seek to move this court to fault the actions by the defendant in so far as their agreement is concerned. In law, no one can be allowed to benefit from his own wrong. It is undisputable that they were aware of the said clause 5(c) which denies them any further notice apart from those reminders issued to them. ~ Page 12 of 14 • It can rightly be said that by consenting to such clause and signing that agreement, and further failing to comply accordingly, they waived their right to be notified as they wished. By virtue of the lease agreement they were duty bound to make payments of the arrears timely and according to the stipulations in their lease agreement. This they did not do. The sickness by the first plaintiff or his failure to remit the rents as he collected from the second plaintiffs, does not, in my view, in any way, exonerate them from their contractual duties for the payment of rent. To the third issue is on what are the reliefs, If any, are the parties entitled to? The plaintiffs severally and jointly pray firstly that the defendant be compelled to .. specifically perform the lease agreement and sub lease agreement. However, I have found that the defendant is not liable for breach of the lease agreement. Further, in view of the plaintiffs' conduct in their relationship, namely failure to make rent payments timely renders them bad tenants and unsuitable partners in lease business, thus, compelling the defendants to proceed with such partners in business would not only defeat the interest of justice, but also prejudicial to the defendant's business. This renders the rest of the prayers fluidly and unsustainable. I proceed to enter judgment for the defendant and award her costs of this suit. Order accordingly. Page 13 of 14

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