

TANZANIA / JUDGMENT

NATIONAL COUNCIL SCANNED

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DECIDED
29 November 2024

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IN THE HIGH COURT OF TANZANIA (LAND DIVISION) AT DAR ES SALAAM LAND CASE NO. 331
OF 2023 NATIONAL CONSTRUCTION COUNCIL..... pT PLAINTIFF
ATTORNEY GENERAL..... 2nd PLAINTIFF VERSUS
MARGARETH E. MOSI.... DEFENDANT STEVEN KARUGILA.....
2ND DEFENDANT JOACHIM A. KAVISHE.....3rd
DEFENDANT

JUDGMENT

1st to 29th November, 2024 E.B. LU VAN DA, J The First and Second Plaintiff above mentioned claims against the First, Second and Third Defendant for arrears of rent a total sum of TZS 75,420,000, a breakdown being TZS 23,500,000 against the First Defendant; TZS 22,530,000 against the Second Defendant and TZS 29,390,000 against the Third Defendant, along TZS 30,000,0000 as general damages. Briefly, Amosi Magomba Mazaba (PW1) asserted that after signing the lease agreements: dated 1/09/2017 rent of TZS 300,000 per month exhibit P1 (house No. 1 Mbezi Beach Quarters); dated 1/2/2017 rent of TZS 300,000 per month exhibit P2 (house No. 6 Mbezi Beach); dated 1/2/2017 rent of TZS 500,000 per month exhibit P4 (house No. 4 Mbezi Beach) for First, Second and Third i Defendant, respectively, only the Third Defendant renewed a lease by acknowledging an increase of rent to a sum of TZS 800,000 as per a lease agreement dated 1/03/2018, exhibit P3. PW1 contended that thereafter the First and Second Defendant refused to sign a new lease agreement which had the effect of increasing rent from TZS 300,000 to TZS 500,000 per month. PW1 also asserted that the First and Second Defendant along the Third Defendant refused to give vacant possession of the demised premises and refused to pay rent. A general defence by the Defendants was that they have been abiding to their obligation to pay rent, only that sometimes in 2018 the suit premises were declared by the First Plaintiff as unfit for habitant and was under untenable condition due to its serious delapidated conditions, citing a letter dated 14/2/2018 exhibit D2; 14/09/2018 exhibit D5; 20/09/2018 exhibit D6; 2/10/2018 exhibit D7 all addressed to the First Defendant. The Defendants defence was that they were under no obligation to pay rent to condemned structures. It is the same letters exhibit D2, D5, D6 and D7 which PW1 was contending that the Defendants refused to give vacant possession even after when they were served with notice to vacate to pave way for major repair. On the same footing, PW1 explained that the First Defendant even rushed to sue 2 seeking preservatory orders for status in quo be maintained for her to continue living in the suit premises, as per the proceedings

cum order exhibit P12. PW1 tendered sketch chart or sheet depicting the trend of payment of rent and an amount due (arrears) for each Defendant: exhibit P5 depict an amount due for First Defendant is TZS 24,000,000; exhibit P6 depict an amount due for Second Defendant is TZS 30,000,000; exhibit P7 depict an amount due for Third Defendant is TZS 40,000,000. PW1 explained that even if the suit premises were declared as unfit for human habitation still the Defendants were under obligation to pay rent, regard being they continued occupying the same under the same condition. Issues framed for determination: One, whether there is a breach of contract by the Defendants; Two, whether there is an outstanding rent arrears to be paid by the Defendants; Three, to what reliefs parties are entitled. For purpose of convenient and logical flow, I will start tackling issue number two: whether there is an outstanding rent arrears to be paid by the Defendants. As stated above, PW1 tendered print out sheet exhibit P5, P6, P7 capturing information for each tenant counting from the date of signing the first lease agreement or commencement of the lease, amount paid and when it was paid, receipts issued and the last column depict balance or unpaid amount for First 3 Defendant is TZS 24,000,000; for Second Defendant is TZS 30,000,000; for Third Defendant is TZS 40,000,000. In defence, the First Defendant tendered a bundle of receipts dated from 29/9/2012 to 9/08/2018 exhibit DI collectively. On my examination, substantially all receipts in exhibit DI collectively, correspond entries in exhibit P5, save for receipt No. 010189 dated 8/02/2016 for a sum of TZS 400,000 and receipt No. 011545 dated 28/12/2017 for a sum of TZS 600,000, was not captured in exhibit P5. The Second Defendant tendered two receipts exhibit D10, where only a receipt dated 9/08/2017 is reflected in exhibit P6, receipt No. 012084 dated 12/10/2018 for a sum of TZS 1,000,000 is not captured in exhibit P6. The Third Defendant tendered a bundle of receipts exhibit D16 collectively, where only one receipt No. 011726 dated 23/02/2018 for payment of rent TZS 1,000,000 features in exhibit P7. The rest electronic receipts are dated a way back in 2017, seemingly pertain to a defence by the Third Defendant (DW3) for a fact that he incurred costs for renovating a suit house. However, on cross examination by Mr. Igid Rumisha learned State Attorney for the Plaintiff, DW3 conceded that he ought to communicate and consult the First Plaintiff prior embarking into renovating the suit house. DW3 conceded that he doesn't have a letter from the First Plaintiff approving the renovation done by the Third 4 Defendant. DW3 tendered a letter exhibit D15, where he requested to renovate a suit house. However, as per concession by DW3 no approval was made by the First Plaintiff authorizing the said renovation. As such, if done was at the peril of the Third Defendant. Likewise, the Second Defendant (DW2) asserted to had incurred a sum of TZS 900,000 for renovating a door and iron bar, however this claim was not supported by any evidence. Indeed, in a letter from the First Plaintiff exhibit D12, DW2 was alerted that he is not allowed to carry out any renovation without approval by the First Plaintiff. As such the renovation done by the Second and Third Defendant, if any, was not blessed or authorized by the First Plaintiff, therefore it cannot be invoked as a defence by way of setting off the amount due in respect of them. Regarding a defence that the suit house was declared by the First Plaintiff as unfit for human habitation. Generally, there is a covenant and condition implied on the part of the lessor to keep the demised premises under tenable condition during the entire period of the lease agreement. Section 88(l)(d) of the Land Act, Cap 113 R.E. 2019, provide, '(1) There shall be implied in every lease covenants by the lessor with the lessee binding the lessor-

- (a) ...N,A...
- (b) ...N.A.... (c)...N.A... 5
- (d) where any dwelling house, flat, or room is leased, that house, flat or room is fit for human habitation at the commencement of the tenancy and will be kept fit for human habitation during the lease' Herein, the First Defendant was served with notice to vacate the suit house to pave way for major repair, on the explanation that the suit house was unfit for human habitation, see exhibit D2, D5, D6, D7. But it is the First Defendant who ignored to heed to a call to vacate, on explanation that by that time her children were at final exams in Form Six, and therefore she was unable to relocate. Again, the First Defendant sued the First Plaintiff as per exhibit P12. Meaning that it was the First Defendant own choice to continue occupying the demise premise while not in tenable condition. Therefore, I go along the argument of PW1 that so long she continued occupying the suit house, was under obligation to pay rent. To my view, the situation could be different if the First Defendant was suing the First Plaintiff for breach of that condition. In testimony in chief, DW2 asserted that a claim from 1/2/2012 to 1/2/2017 is unknown to him, for explanation that he was not a tenant by then. In addition, DW2 defended that those claims are time barred. When DW1 was cross-examined by the learned State Attorney for Plaintiffs, asserted that technically he started living in the suit house from 1999, but he officially took over the lease agreement from the predecessor tenant one Grace 6 Kyaruzi (who is the DW2's aunt) in 2017. Indeed, in evidence, PW1 tendered a lease agreement exhibit P2 showing the commencement date was 1/2/2017. Therefore, the previous debt has nothing to do with DW2. Again, in exhibit P5 and P6 the catchup period is 1/09/2012 and 1/2/2012, respectively. This suit was filed on 27/09/2023. According to item 13 Part I Schedule to the Law of Limitation Act, Cap 89 R.E. 2002, the period of limitation to sue for suit to recover arrears of rent, is six years. Herein counting from when this suit was presented for filing on 27/09/2023, the period of six years, if reckoned backward will end up at 29/09/2017. Meaning that all claims counting backward, are time barred. Therefore the following amount or claim: TZS 9,520,000/= in item 1, 2, 3, 4, 5 in exhibit P5 for First Defendant and TZS 7,110,000 in item 1, 2, 3, 4, 5 in exhibit P6 for Second Defendant, are ruled to be item barred. The Third Defendant (DW3) on cross examination by the learned State Attorney, concede that he is willing to pay from 2019 onwards including three months for a lease from 2018 to 2019. In his closing arguments, the Third Defendant submitted that in the plaint paragraph 7(iii) it expressly mentioned that they are claiming from the Third Defendant a sum of TZS 29,390,000 as unpaid rent. He submitted that in evidence they mentioned a sum of TZS 40,190,000, argued 7 it is a departure to the pleadings, citing *James Funke Gwagilo vs The Attorney General*, Civil Appeal No. 67 of 2001, CAT, at page 3 ruled, 7/7 his judgment, Kyando, J. considered the departure from the pleadings and refused to consider the new grounds, stating thus: "What do the rules of pleadings say in relation to the situation revealed here? The general rule is that a party is bound by his pleadings and should not be allowed to succeed on a case not made out of his pleadings..In *HEMCHAND V. PEAREYLAL*, A. 1942 P.C 64, an Indian case, the Privy Council characterized as irregular the procedure of the trial court in allowing evidence to

adduce on points not raised in the pleadings or issues and held that this should not have allowed without amendment of the pleadings and issues. I see no grounds in the instant case for departing from these general rules of pleadings. This is because the parties had an opportunity to amend their respective pleadings and include the points that were later raised but did not utilize that opportunity. They are now therefore bound by their pleadings and the additional grounds or points raised are hereby rejected for having no been pleaded" I have chosen the above position, for reason that although is not recent, but seem to be more progressive approach rather than restrictive. Therefore, only the pleaded amount of TZS 29,390,000 against the Third Defendant will be deemed to have been proved. The additional amount is discarded as it offends the above rule. This verdict will also favour the First and Second Defendant 8 whose only a sum of TZS 23,500,000 and TZS 22,530,000 respectively, was pleaded against them. Therefore a sum of TZS 24,000,000 in exhibit P5 vis-a- vis a pleaded sum of TZS 23,500,000 will eventually lead to an additional of TZS 500,000 to be discarded as it was un-pleaded. In that regard, it will remain a sum of TZS 23,500,000 minus TZS 9,520,000/= (held to be time barred) minus 2,000,000 (ruled to be successfully defended vide exhibit DI), the amount due as against the First Defendant will be TZS 11,980,000/=. For the Second Defendant a sum of TZS 30,030,000 in exhibit P6 vis-a-vis a pleaded sum of TZS 22,530,000, will eventually take away a sum of TZS 7,500,000 which is accordingly discarded for being un-pleaded amount. Therefore, I retain a sum of TZS 22,530,000 minus TZS 7,110,000 (held to be time barred in exhibit P6) minus TZS 1,000,000 (successful defended vide exhibit D10), amount due against the Second Defendant will be TZS 14,430,000. For avoidance of doubt, the Defendants are held to be indebted arrears of rent as follows: First Defendant TZS 11,980,000/=; Second Defendant TZS 14,430,000 and Third Defendant TZS 29,390,000. In that way, it is ruled that the First, Second and Third Defendant are in breach of the contract (lease agreement) for failure to observe their covenant for paying rent, to the extent demonstrated above. Therefore, issue number one and two, are ruled in affirmative. 9 As to the reliefs. The Defendants are liable to pay the First Plaintiff as follows: First Defendant TZS 11,980,000/=; Second Defendant TZS 14,430,000 and Third Defendant TZS 29,390,000. The First Defendant was said to have handed over the suit premises vide a letter exhibit D3 which fact was acknowledged by PW1. The Second Defendant complained that a demise house was inhabitable. Therefore, he is ordered to give vacant possession. The Third Defendant is also ordered to give vacant possession unless sooner execute a valid lease agreement with the First Plaintiff as per the agreeable terms (this verdict is without prejudice to any valid subsisting lease agreement, if any). The proceedings orders and reliefs are accommodated under a passage (f) at the extreme end of the plaint, going by the wording any relief this Court deems fit and just to grant. Indeed, in circumstances of this case, these incidental orders are genuinely just grantable. The suit is granted to the extent demonstrated above. Each party will defray its own costs. Judgment delivered in the presence of the First, Second, Third Defendant and Ms. Christina Mgonya Sate Attorney for the Plaintiffs. 11

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