

TANZANIA / JUDGMENT

20151120 TZHC Dar es Salaam

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20 November 2015

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IN THE HIGH COURT OF TANZANIA DAR ES SALAAM DISTRICT REGISTRY AT DAR ES SALAAM (APPELLATE JURISDICTION) CONSOLIDATED CIVIL APPEALS NO. 24 & 31 OF 2014 (From the Resident Magistrates' Court of Morogoro at Morogoro in Civil Case No. 4 of 2003 -Hon. M.J. Yusuph, RM) PRIDE TANZANIA LIMITED APPELLANT VERSUS

1. ADAM I. KIMVULI (Suing as administrator of The estate of the late ANNA BUNDALA) (2. ZUHURA UBWABWA Trading as
3. B.M. MAKTAUO · BORA KV TRADERS ... RESPONDENTS
4. ADAM I. KIMVULI
5. NATIONAL HOUSING CORPORATION ... STH RESPONDENT Date of Last Order: 22 nd September, 2015 Date of Judgment: 20th November, 2015

JUDGMENT

FELESHI, J.: In the Resident Magistrates' Court of Morogoro at Morogoro, the appellant (in Civil Appeal No. 24/2014) sued the respondents for disapproval of letting of premises by the 5th respondent to 1st - 4th respondent, declaration that a sub tenancy created between BORA CONSUMERS COOPERATIVE SOCIETY and the appellant was still legally valid, declaration that a purported notice to quit is null and void and of no legal effect, permanent injunction and costs of the suit. On their part, the respondents in Civil Appeal No. 24/2014 (who filed a Cross Appeal vide Civil Appeal No, 31/2014) filed a Counter Claim suing for payment of an outstanding rent of Tshs. 38,364,120/= against the . appellant and payment of interest at bank rate of the outstanding debt. Page 1 of 10 -\ . . Before the trial Court, for reasons of failure to appear and prosecute their case, the trial Court proceeded with hearing of the Counter Claim as filed by the respondents whereas Judgment was entered by the trial Court in favour of the respondents with order for payment of Tshs. 14,400,000/= as principal sum at bank rate, interest of the outstanding rent from June, 1998 to the date of Judgment with no order as to costs. Aggrieved, the appellant in Civil Appeal No. 24 of 2014 has appealed on five grounds of appeal namely:-

1. That, the learned trial Magistrate erred both in law and in fact in holding that. the appellant failed to bring evidence that the outstanding rent due was fifty five {55} months, that is, from August, 1999 up to February, 2004.

2. That, the trial Magistrate erred both in law and in fact in holding that the respondents proved that the appellant has failed to pay to them shillings 14,400,000/= while no such proof was adduced in Court. ·
3. That, the trial Magistrate erred both in law and in fact in holding that the appellant is not entitled to the refund of the amount that was paid directly by the appellant to the National Housing Corporation.
4. That, the trial Magistrate erred both in law and in fact in holding that the respondents were entitled to the paid interest while there was no justification for such payment.
5. That, the trial Magistrate erred both in law and in fact in awarding the respondents interest on the outstanding rent from June, 1998. On the other hand, the respondents in Civil Appeal No. 24/2014 preferred a Cross Appeal vide Civil Appeal No. 31/2014 with a single ground of appeal namely:-
1. That, the trial Court erred both in law and in fact in denying the appellants costs for the case and without assigning reasons. The appeal was heard by written submissions whereas the appellant in Civil Appeal No. 24/2014, that is, the respondent in Civil Appeal No. 31/2014 hereinafter referred to as the 1st limb appeal, engaged services of Mawenzi Advocates' Chambers while the appellants in Civil Appeal No. Page 2 of 10 " - 31/2014, that is, the respondents in Civil Appeal No. 24/2014 hereinafter referred to as the 2nd limb of appeal, were represented by Taslima Law Chamber Advocates. Parties complied with the Court schedule, hence, this Judgment. Notably, in both limbs of appeal, no rejoinders were filed. Addressing the 1st ground in the 1st limb of appeal where the appellant is PRIDE TANZANIA LIMITED whereas the respondents are ADAM I. KIMVULI (suing as administrator of the estate of the late ANNA BUNDALA), ZUHURA UBWABWA, B.M. MAKTAUO & ADAM I. KIMVULI, the appellant's counsel submitted that, vide a sub tenancy lease agreement signed on 27/05/1996 between the appellant and BORA CONSUMERS COOPERATIVE SOCIETY, a monthly rate of Tshs. 200,000/= from 1/06/1996 to 31/05/1997 paid the annual rent for the period of 01/06/1998 to 31/05/1999 was agreed upon though it was later discovered that the said payment was not paid by the tenant to the National Housing Corporation. Being the case, the appellant had to pay a further sum of Tshs. 1,872,158/= that included penalty and was for the period up to July, 1998. Moreover, following inability to pay by BORA CONSUMERS COOPERATIVE SOCIETY, the appellant was offered a tenancy agreement by the National Housing Corporation on 11/08/1997 meaning that the rent due for the premises was only from August, 1999 up to February, 2004 when the appellant vacated the premises. Thus, to the appellant's counsel, rent was for fifty five months, that is, from August, 1999 up to February, 2004. Regarding the 2nd ground in the 1st limb of appeal, the appellant's counsel submitted, no proof was availed to substantiate award of Tshs. Page 3 of 10 , - 14,400,000/=. In respect of the 3rd ground, the appellant's counsel submitted, the appellant paid directly to the National Housing Corporation the sum of Tshs. 1,872,158/= after the tenant BORA CONSUMERS COOPERATIVE SOCIETY failed to pay the said sum. Besides, the fact that the said amount was paid to the National Housing Corporation and the fact that that

fact was not disputed by the respondents, the appellant is thus entitled to the refund of the paid sum to National Housing Corporation. Addressing the 4th and 5th grounds of appeal altogether, the appellant's counsel submitted that, there was ample evidence that the delay to pay the rent to the tenant BORA CONSUMERS COOPERATIVE SOCIETY by the subtenant (the appellant) was due to the fact that there was a dispute as to whom the said rent was to be paid to. Being the case, the appellant and BORA CONSUMERS COOPERATIVE SOCIETY were not the authors of the delay and therefore, the respondents are not entitled to be awarded interest from June, 1998 to the date of Judgment as held by the trial Court. In reply to the 1st limb of grounds of appeal, the respondents' counsel submitted that, the trial Magistrate was correct to hold that the outstanding rent due was fifty five (55) months, that is, from August, 1999 up to February, 2004 for the appellant only claimed to have paid through MARIAM NGONYANI though no proof was availed in Court. He added that, the trial Court was thus justified to pay Tshs. 14,400,000/= as rent dues from June, 1998 to February, 2004. Besides, the trial Court was justified to order for refund of the amount of money paid directly to the National Housing Corporation for the 1st - 4th Page 4 of 10

- respondents were not responsible in receiving the payments for the appellant confirmed that the payment was made directly to the National Housing Corporation (5th respondent) but without consultation to the 1st - 4th respondents adding that, it is the National Housing Corporation (the 5th appellant) which is responsible for refund and not the 1st - 4th respondents. Regarding the 2nd limb of the grounds of appeal, the appellants' learned counsel submitted that, they are entitled to costs because of failure of the appellant to prosecute Civil Case No. 4/2003 which lasted in Court for eleven years in which the appellant engaged services of an advocate whom they paid instruction fees and since their advocate resided in Dar es Salaam, they had also to incur fare, meals and accommodation costs. Besides, the appellants' counsel added that, the appellants filed several documents in Court including Written Statement of Defence, Counter Claim and Written Submissions among other documents of which they incurred costs thus entitling them for award of costs. Moreover, the trial Court erred in law in terms of section 30(2) of the Civil Procedure Code, [CAP. 33 R.E, 2002] for not assigning reasons as to refusal to award costs to the appellant. He cited the case of MOHAMED SALMINI vs. IUMANNE OMARY MAPESA, Civil Application No. 4/2014 (Dodoma Registry) (Unreported) where the Court of Appeal of Tanzania underscored at page 3 that:- " As a general rule, costs are awarded at the discretion of the Court. But the discretion is judicial and has to be exercised upon established principles, and not arbitrarily or capriciously. One of the established principles is that, costs would usually follow the event, unless there are reasonable grounds for depriving a successful party his costs. ". Page 5 of 10 \.. In another case of DEVRAM NANJI DHATHAN vs. BARIDAS KALIDAS DAWDA, 16 E.A.C.A 35, the Court superseded East African Court of Appeal held that:- "From the decisions which were cited to us during the hearing of the appeal, it appears to me to be clear that a successful defendant, who after all is brought into Court against his will, can only be deprived of his cost when it is shown that his conduct either prior to or during the course of action, has led to litigation. which but for his own conduct might have

been averted". In response to the single ground of appeal regarding costs of the suit in the trial Court, the respondent's counsel submitted that, the existing confusion as to whom the rent ought to have been paid was a justifiable cause for the trial Court not to award costs of the suit in favour of the appellant. He thus urged for the sole ground of appeal to be dismissed. Having gone through the Court record and the respective submissions by the parties herein, this Court has the following in disposal starting with the 1st limb of appeal that is, Civil Appeal No. 24/2014. In the first place, all the five (5) grounds of appeal can be consolidated into a single ground as to whether the awarded Tshs. 14,400,000/= by the trial Court has any legal justification. It is evident that per the testimony of PW1 ADAM I. KIMVULI availed during proof of the Counter Claim that, in 1998, the respondents entered into a sub tenancy agreement with the plaintiff. It was agreed on the sub tenancy agreement that, rent would be paid at Tshs. 200,000/= per month the same payable in advance. From June, 1998 to May, 2004, the plaintiff did not pay the same resulting into a cumulative sum of Tshs. Page 6 of 10

- 14,400,000/=. Notably, such evidence was not supported by any documentary evidence as Exhibit to substantiate the same. During cross examination, PW1 ADAM KIMVULI briefed the Court that the contract was between PRIDE TANZANIA and BORA CONSUMERS COOPERATIVE SOCIETY with the initial agreement made in May, 1996 starting from 01/06/1996 to 01/06/1997. He added, there was no proof that the appellant ever paid Tshs. 1,800,000/= to NATIONAL HOUSING CORPORATION. In defense, DW1 MARIAM NGONYANI acknowledged PRIDE . TANZANIA LIMITED to have sub rented from BORA CONSUMERS COOPERATIVE SOCIETY and that parties to the agreement agreed for payment of Tshs. 200,000/= per month payable in advance for a year. She added that, the 2nd installment which was paid directly to the NATIONAL HOUSING CORPORATION was Tshs. 1,800,000/= whereas the NATIONAL HOUSING CORPORATION refunded a sum of Tshs. 600,000/= while the remaining sum was not refunded. Besides, DW1 acknowledged that PRIDE TANZANIA LIMITED is supposed to pay Tshs., 11,000,000/= from 1999 to 2004 covering 55 months. From the above pieces of evidence, it is unfortunate that the plaintiffs in the Counter Claim did not tender any Exhibit in proof of the asserted sub rent agreement that could have cleared the amount due ought to be paid, to whom the same ought to have been paid and under which modality. Besides, neither the respondents nor the appellant tendered evidence substantiating the claimed payment of Tshs. Page 7 of 10 _ · 1,800,000/= by the appellant to the NATIONAL HOUSING CORPORATION and or refund of Tshs. 600,000/= by the NATIONAL HOUSING CORPORATION to the appellant. Though oral evidence is admissible, such oral evidence cannot supersede reliability of documentary evidence especially in circumstances where parties allege over documentary evidence but without description as to why they failed to tender such documentary evidence to justify for the Court to rely on oral evidence in lieu of documentary evidence. Thus, this Court finds to be of low evidentiary value the claims over existence of a sub rent agreement between PRIDE TANZANIA LIMITED and BORA CONSUMERS COOPERATIVE SOCIETY over an agreed rent of Tshs. 200,000/= per month, payment of Tshs. 1,800,000/= and reimbursement of Tshs. 600,000/=. This is from the

firm position of our law in terms of section 110(1) of the Evidence Act, [CAP. 6 R.E, 2002] that whoever desires a Court to give evidence in his favour bears the burden to prove existence of such facts. Failure to avail such evidence to that effect leaves the Court with a straight option, that is, to descant grant of the sought remedies. But considering that the appellant conceded to be indebted to the tune of Tshs. 11,000,000/=, this Court enters Judgment to the extent of the said admission with orders for the appellant to effect payment of the said sum in favour of the party whom PRIDE TANZANIA LIMITED entered into the sublet agreement in terms of the agreed terms of subletting agreement. Page 8 of 10 .. Regarding payment of interest, the sub letting agreement not being a bank business of lending and or borrowing money and considering that no evidence has been availed to prove existence of any clause in the alleged subletting agreement requiring payment of interest at Bank rate, this Court refrains from making such an award thus varying the awarded interest at bank rate. Moreover, no evidence was availed on record for award of interest above 7%. Being the case, I hereby award the statutory interest of 7% from the date the said payment accrued until the date of Judgment. Thus, the above grounds of appeal succeed to the above extent. Now, regarding the sole ground in the 2nd limb of grounds of appeal, it is clear on record that, the trial Court did not avail reasons for not awarding the appellants costs of the suit. As correctly submitted by the appellant's counsel, apart from assigning reasons for not awarding costs to the appellant, to this Court, the persisting circumstances of the case as narrated by the appellant's counsel justify award of costs in favour of the appellant in Civil Appeal No. 31 of 2014. One, the fact that the appellant engaged the services of an advocate, two, that the appellants incurred costs as to transport, meals, filing and instruction fees and three, considering that the appellants did not prove to have labored enough to pay rent to the respective person in return of the accommodation services rendered to her is a justification for award of costs to the appellants. The argument that the respondent did not know where to pay the said amount in a period of over five (5) years is unfound and is out rightly dismissed for been devoid of merits in law. Page 9 of 10 ,Therefore, the appellants in the 2nd limb of appeal, that is, Civil Appeal No. 31/2014 are awarded costs of the suit before the trial Court. In a nutshell, from the above finding in unison, the appeal succeeds to the above extent. Costs are awarded in favour of the respondents in Civil Appeal No. 24/2014 who are the appellants in Civil Appeal No. 31/ 2014, that is, ADAM I. KIMVULI (suing as administrator of the estate of ANNA BUNDALA), ZUHURA UBWABWA, B.M. MAKTAUO, ADAM I. KIMVULI & NATIONAL HOUSING CORPORATION against the appellant in Civil Appeal No. 24/2014 who is the respondent in Civil Appeal No. 31/2014, PRIDE TANZANIA LIMITED. Each party to bear her own costs in these appeals. It is so ordered. Dated aLD~ es Salaam this 20th November, 2015 JUDGE Judgment delivered in chambers this 20th day of November, 2015 in presence of Mr. Ngatunga, Advocate for the Appellant/Respondent and Ms. Hawa, Advocate ~-""""ent/Appellant. Right ~ 0f Appeal is explained. .. ESHI JUDGE 20/11/2015 Page 10 of 10

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