IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MWANGESI, J.A., NDIKA, J.A. And KITUSI, J.A.)

CIVIL APPEAL NO. 245 OF 2017

DIRECTOR MOSHI MUNICIPAL COUNCIL ..... APPELLANT

VERSUS

JOHN AMBROSE MWASE ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Moshi)

(Mwingwa, J.)

dated the 17th day of June, 2016
in
Civil Case No. 16 of 2013

JUDGMENT OF THE COURT

5th & 11th April, 2019

KITUSI, J.A.:

John Ambrose Mwase, the respondent, won before the High Court of Moshi in a claim for damages arising out of an alleged wrongful demolition of business premises by the Director of Moshi Municipal Council, the defendant, now appellant. The respondent's claim was for payment of Shillings 714,000,000.00 being the value of the goods that were in the shop at the time of the challenged demolition, and that as a result of that demolition, the said goods were irreparably damaged or got lost. He also

prayed for general damages for pain and suffering, as well as costs of the suit.

The appellant denied liability and justified the demolition, raising a counter claim for shillings 568,000.00 being the costs incurred for the demolition. It also accused the respondent for breach of the tenancy agreement between them, and prayed that a declaratory order be issued to that effect. The appellant's justification for the demolition was that the respondent, a tenant, made constructions on the suit premises without prior permission of the appellant as the owner of those premises, and without a building permit from the relevant authority, as per law. It turns out that the appellant was both the owner of the demised premises and also the relevant authority for purposes of building permits.

The case arose from the following facts; The appellant, the Chief Executive Officer of Moshi Municipal Council, a body corporate under the laws, owns business premises in Moshi Municipality, including the suit premises within the appellant's building at Mawenzi Ward, in the Municipality. On 1st July 2012, the appellant entered into a three-year tenancy agreement with the respondent, with the latter as the tenant designated to run a restaurant within the premises, and all was, initially well.

That on 17th May 2013 upon the respondent's request, the appellant gave him permission to change the business from that of a restaurant to a shop. Thereafter, the respondent purchased enough merchandize to stock the shop, a list of which was annexed to the plaint, but hardly two months later, that is on 3rd July, 2013 at night, the appellant demolished the said shop. It was alleged by the respondent that at the time of the demolition of the shop it was full of goods, the value of which according to the pleadings, was Shillings 714,000,000.00.

The respondent further alleged that the demolition by the appellant was carried out without Notice and without considering the investment that he had put in terms of stocking the shop. Further that this happened when the respondent was servicing a loan which he had secured with Kenya Commercial Bank. He prayed for the following orders;

a) Compensation for loss of merchandise namely household goods worth Tshs 714,000,000
b) General damages for pain and suffering
c) Costs of the suit.
d) Any other reliefs that the Honourable Court deems fit to grant.

On the other hand, the appellant did not dispute the fact that it demolished the suit premises, but maintained that it did so under the

relevant laws after the respondent violated them. The appellant also raised a counter claim for the sum of Tshs 568,000/= being the costs of the demolition of the premises which the respondent had been notified to carry out himself. It accused the respondent with breach of contract, that is, the making of extension to the demised property without the prior consent of the lessor.

Seven issues were agreed upon at the commencement of the trial before the High Court, and these are;

1. Whether the plaintiff (now the respondent) was a lawful tenant.
2. Whether the plaintiff sought and obtained the permission to change use of the suit premises.
3. Whether the defendant (now the appellant) is in breach of any terms of Tenancy.
4. Whether the demolition done by the defendant to the constructed premises was lawful.
5. Whether the defendant was entitled to compensation of Tshs 568,000 as costs for demolition
6. Whether in the demolished building there were items as the plaintiff is claiming.
7. What reliefs are the parties entitled to.

In order to avoid deliberating on areas where the parties are not at issue, we have deemed it fit to observe at the very outset that the first and second issues were redundant from the beginning as the pleadings unequivocally showed that the respondent was a lawful tenant and had obtained permission to change the business that he was running at the suit premises. It is also apt to note that the appellant did not and still does not dispute demolishing the premises. What called for proof therefore were issues number 3, 4 and 6.

At the end of the trial the High Court was satisfied that the demolition was unlawful and that at the time of executing it there were, in the shop, goods worth shillings 500,197,551, the property of the respondent. The appellant was therefore ordered to pay that amount to the respondent. Aggrieved, the appellant has come to this court on appeal. After the appellant's informal application to make additional grounds of appeal, which was not resisted to by Mrs Elizabeth Minde, learned advocate for the respondent, and after the appellant had abandoned two grounds, the appeal was argued on the basis of the following four grounds;

1. *That the honourable Judge erred in law by failing to consider the prerequisite of the law that prior to*

construction of any building in a master planned area there must be a permit from authority concerned.

2. *That the honourable Judge erred in law by failing to address on the issue of breach of the term of the tenancy agreement that necessitated the appellant to demolish the premises and if at all the demolition was lawful.*
3. *That the High Court erred in law by admitting and giving weight to unstamped receipts contrary to mandatory provisions of section 47(1) of the Stamp Duty Act [Cap 189 R.E. 2002].*
4. *That the High Court erred in law for failure to consider counter claim that was proved on the balance of probabilities by the appellant herein.*

Both in the written submissions and in the oral submissions, Mr. Deodatus Nyoni, the Solicitor of Moshi Municipal Council, began by inviting us to re-evaluate the evidence on record for the reason that we are sitting on first appeal. We accept the invitation because as stated in the cases cited by the learned Solicitor we have the powers to do so. The cases cited by Mr Nyoni are**; Dr. Maua Abeid Daftari V. Fatma Salmin Said**, Civil Appeal No 108 of 2011 (unreported) and; **Materu Leison and J. Foya V. R. Sospeter** [1988] T.L.R 102. Our power to re appraise evidence, if we must

necessarily state the obvious, arises from Rule 36(1)(a) of the Court of Appeal Rules, 2009. In view of that position, we have identified the following issues which will address both the key issues that were before the trial High Court, as well as the grounds of appeal before us. These are;

1. Whether the renovations of the suit premises that were carried out by the respondent required a building permit as per law, and if so whether the respondent obtained that permit.
2. Whether the appellant's acts were justified in law or under the contract.
3. Whether at the time of the demolition of the shop there were goods in it, and if so, how much worth of goods.

The respondent called a total of four witnesses, himself testifying as PW4. Testifying on the terms of the Lease Agreement and whether any of the parties are in breach, PW4 stated that in the letter that he had written to seek permission to change the type of business, he did also request to be permitted to renovate the premises and that he was granted both by the appellant. In the submissions by learned counsel for the respondent, she urged us to hold that the demolition was unlawful and appellant guilty of breach of contract, because there was no Notice. and that in any event it did

not afford the respondent reasonable time. She argued that the appellant's allegation that the respondent had made constructions on the premises were not proved by evidence and that, if anything, the minor works that were done by the respondent on the premises did not require the seeking and obtaining of a building permit as alleged.

On the other hand, Herriet Kimaro (DW1), a Building Inspector working for the appellant, testified that the letter granting the respondent permission to change the type of business did not permit him to change the building. However, through a letter from one Rogasian Peter Shirima (DW2), the Ward Executive Officer of Mawenzi, within which the suit premises are located, DW1 came to know that the respondent was carrying out alterations in the premises in the form of extension. DW2 stated that the respondent had made an 8-metre extension in front of the premises contrary to the governing contract, so he wrote to inform the appellant about it. Samwel Tumaini Mlay (DW3) the Municipal Trade Officer is the one who dealt with the respondent's request for change of business and granted it. He said however, that the permission was limited to change of business. In his submissions, Mr Nyoni relied on both the law and the evidence. The learned counsel cited Section 29 of the Urban Planning Act No 8 of 2007 which

requires anyone who develops land within a planning area, to acquire a planning consent prior to executing the intended development. He also referred to Regulations 124 and 139 of the Local Government (Urban Authorities) (Development Control) Regulations, 2008. Regulation 124(1) requires anyone who intends to erect a building to seek and obtain a building permit. Regulation 139(1) prescribes the consequences of violating Regulation 124.

At the instance of the court, Mr Nyoni addressed the question whether any other landlord would be justified to demolish a demised property as a step against a tenant who carries out renovation or extension without permit. The learned counsel responded by submitting that the appellant had dual capacity, one contractual as the owner of the premises and the other statutory as the planning and building control authority.

We have considered the evidence before us, and we are satisfied that in demolishing the suit premises, the appellant acted under the law. The main reason for concluding so is the way the Stop Order and Demolition Order (collectively admitted as Exhibits D3) were couched. They were issued under the Rules made under the Town and Country Planning Act, Cap 355.

Now let us deliberate on the first issue, namely whether what was done by the respondent on the suit premises amounted to construction requiring permit, and whether that permit was obtained. The respondent (PW4) stated this at page 136 of the record during examination in chief;

> *"Then I proceeded to obtain the business licence and make a renovation of that building by removing the hotel windows kept the doors and making a partition by using birder. I was permitted to make a changes of building to be a shop a letter dated 17/5/2013".*

Again during cross examination appearing on page 138 of the record, PW4 stated;

> *"When I lodged to change the business Hotel to shop, also I requested to make renovation I was allowed and given a letter."*

The appellant's case is that the respondent was making an extension of the room, and DW2 was very categorical about it, that he had added 8 metres in front of the existing structure. Interestingly the theme of questions that were put to DW2 by Mr Kilasara, learned advocate, during cross examinations, did not seek to fault him on the testimony that the respondent carried out extension. This attitude is not surprising because it is consistent with the respondent's own pleadings and evidence. We have referred to

excerpts in the respondent's evidence that show that he renovated and sought permission to do so. Under paragraph 4 of the Reply to the Written Statement of Defence, the respondent stated;

> **4.** *'The contents of paragraph 6 are disputed for being false and misconceived. The plaintiff states that he purchased a variety of goods as per annexture P5 and* ***substantially facelifted the suit premises....''***

On the whole we think the appellant has made a case for us to make a finding that the respondent made renovations including extensions. This we do in our exercise of powers of re-appraisal of evidence, based on the following grounds. First, the respondent's pleadings, by which he is bound, show that he made renovations, alterations or substantial face-lifting. Secondly, the issue of the unpermitted construction having been raised in the counter claim and DW2 having testified on it, that fact was not controverted even by way of cross examinations. Thirdly, the respondent's clear indication in his testimony, that he knew that what he was doing required permit, and went on to state that he sought and obtained one in writing. With respect however, that letter allegedly granting him the permit was never produced in evidence, therefore there is no proof of that fact. We

think we are entitled to take into account the respondent's piece of evidence in that regard as furthering the appellant's case. This court has previously taken that approach although it was in criminal cases. In **Khamis Abderehemani V. The Republic,** Criminal Appeal No 21 of 2017, (unreported) the court held in part;

> *"By his coming up with the defence of consensual sex also serves to show to what extent that the appellant knew that the victim of rape was not a girl of under the age of 18 where consent is immaterial, a woman whose lack of consent is an essential ingredient which the prosecution needed to prove in the offence of rape against him".*

Similarly, in this case the evidence of PW4 that he sought permit from the Authority, though unsubstantiated, supports the appellant's case that what was being done by him required permit. We take the view that the approach of the court in the case of **Khamis Abderehemani V. The Republic** (supra), though a criminal case, is relevant to the situation at hand.

Mrs. Minde's submission that what was done by the respondent involved some minor works that did not require a building permit, is not only a statement from the bar, but contradicts PW4 himself as well as the

pleadings. We are, with respect, unable to tow counsel's line, because Regulation 124(1) of the Local Government (Urban Authorities) (Development Control) Regulations, which was cited to us by Mr Nyoni is clear as it provides;

> *"124(1) No person shall erect or begin to erect any building until he has -*
>
> *(a) made an application to the authority upon the form prescribed in the Fourth Schedule to be obtained from the Authority*
>
> *(b) furnished the Authority with the drawings and other documents specified in the following regulations and;*
>
> *(c) obtained from the Authority a written permit to be called a "building permit."*

Section 2 of the Urban Planning Act no 8 of 2007, under which the said Regulations are made, defines 'erection' as;

> *"Erection in relation to buildings includes extension, alteration and re erection".*

This disposes of the first issue and the first ground of appeal. We uphold the appellant on the complaint that the learned Judge erred in not

acting on unstamped Tax Invoices. Mr Nyoni raised general doubts as regards the authenticity of the documents that were tendered to prove the stocks in the shop, and particularly attacked those which had no stamp duty, appearing on pages 165 to 169 and those on pages 172 to 174 of the record. He cited Section 47 of the Stamp Duty Act, [Cap 189 R.E. 2002] which provides for the requirement to have such documents stamped before being used in evidence. In reply Mrs Minde conceded to the omission to stamp some of the invoices but proceeded to submit that such omission is not fatal as the court has discretion. As regards the general doubt on the authenticity of the documents that were tendered to prove the stocks, the learned counsel submitted that the appellant had ample time to cross check with the suppliers in order to satisfy himself that they were authentic or not because the respondent filed a list of documents that were to be relied on ahead of the hearing. In his rejoinder Mr Nyoni referred to Section 110 of the Evidence Act which requires a party who alleges existence of a fact, to bear the burden of proof.

On our part we feel that we must express our being rather surprised by the suggestion that the appellant had the duty to disprove the respondent's evidence on the authenticity of the documents, before the said

considering that the respondent did not fulfill the statutory requirement for a building permit.

Next is whether the appellant acted within the law. This issue aims at addressing the complaint by the respondent, I think in the alternative, that if the Municipal Authority had the powers to demolish, it did not issue the respondent with Notice. Mrs Minde, learned advocate, submitted on this at length arguing that there is no proof that the appellant served the respondent with adequate notice, and further that carrying out the demolition at night suggests ill motive. In response to this Mr Nyoni submitted that there is no law against carrying out demolition at night and insisted that service of Notice was effected.

With respect, the contention that no Notice was issued finds no support because the record bears out the appellant that one was issued. Since we have found in the preceding page that the respondent's construction was carried out without a building permit therefore illegal, the demolition by the appellant upon issuance of the notice was lawful.

We now turn to the issue; whether there were goods in the shop when it was demolished, and if so of what quantity. We propose to deal with this issue along with the ground of appeal that criticizes the trial High Court for

respondent had adduced evidence to prove their authenticity. We think that the principle that the one who alleges a fact must prove it, which finds its basis on Section 110 of the Evidence Act, Cap 6, cited to us by Mr Nyoni, is settled. It has been emphasized by this court in numerous decisions, such as **Anthony M. Masanga V. Penina (Mama Mgesi) and Another**, Civil Appeal No 118 of 2014 (unreported). In this case which has been followed in subsequent decisions, the court held in part;

> *"Let's begin by re-emphasizing the ever cherished principle of law that generally, in civil cases, the burden of proof lies on the party who alleges anything in his favour."*

We have to resolve this issue and we have decided to do so by re-appraising the documentary evidence related to the purchases of the shop goods from BORDAR LIMITED and SUNDA (T) INVESTMENT CO. LTD by taking a closer look at the exhibited Tax Invoices and Delivery Notes from these companies. They appear on pages 164 -174 and 200-205 respectively.

From Bordar we have the following Tax Invoices, with dates in brackets; No. 0636 (28/5/2013); No.0635 (5/6/2013); No. 0647 (14/6/2013); No.0658 (20/6/2013); No. 0653 (28/6/2013). These invoices raise eyebrows for the following reasons. First of all, it is curious that this

Dar es Salaam based wholesale company seems to have been issuing Tax Invoices only to the respondent, because the invoices are in sequence. Secondly, the numbers of the Invoices and their dates cannot be telling a true story because at times a bigger number is issued on a date earlier than a small number. For instance, Tax Invoice No.0636 was issued on 28/5/2013 before the issuance of Tax Invoice No 0635 on 5/6/2013. Tax Invoice No. 0658 was issued on 20/6/2013 while Tax Invoice No 0653, with a smaller number, was issued on 28/6/2013.

Numbers of the Tax Invoices apart, the conduct of the respondent raises more questions. For instance, why did he purchase goods worth Tshs 205,951,315/ from Sunda between 2/5/2013 and 16/5/2013 when he had not even been granted permission to run a shop within the premises instead of the restaurant? The letter granting him permission to change the business is dated 17/5/2013. At around the same period the respondent also purchased about 300 mattresses from Pan Africa Enterprises in Arusha (13/5/2013) before the letter of permission to change business, and about 450 mattresses on 28/5/2013. We have, at the end of the day, found it irresistible to conclude that the Tax Invoices and Delivery Notes tell an

untrue story and that had the learned High Court Judge painstakingly scrutinized them he would not have based his decision on them.

But even then, assuming the said invoices and delivery Notes were authentic as claimed by the respondent, they only go to the extent of proving that the mentioned goods were purchased from those two shops in Dar es Salaam. They are not proof of the fact that those goods were transported to Moshi and kept in the respondent's shop, which is a critical point to resolve the issue at hand.

We are, undoubtedly, alive to the settled law that every witness is entitled to credence. See **Goodluck Kyando V. Republic**, [2006] TLR 367 and many others. However, for the reasons we have demonstrated above, we think PW4 is not worth of any belief.

Since the conclusion to award the respondent monetary compensation amounting to Tshs 500,197,551= as special damages was, though not so clearly stated, based on the evidence of PW4, Thomas Peter Assenga (PW2) his accountant and Godfrey E. Ngowi (PW3) his shop attendant, who, especially PW4, testified on the documentary exhibits which tell a lie about themselves, that conclusion in our view cannot stand. We must add, that the claims were specific in nature and needed strict proof, which the respondent

did not adduce. Accordingly, we find merit in the third ground of appeal that questions the authenticity of the Tax Invoices and we answer the third issue that we raised for determination, that there is no proof that at the time of the demolition there were goods in the shop

Lastly, there is the issue of the counter claim that was raised by the appellant, and it has formed a basis of complaint before us. The appellant's complaint is that the High Court did not decide on it one way or the other. Mr Nyoni submitted very briefly on it, that the High Court did not deliberate on it. Mrs Minde for the respondent did not allude to this point. We are in agreement with Mr Nyoni that both the trial court and the appellate High court did not determine the counter claim. In disregard of the provisions of Order VIII Rule 12 of the Civil Procedure Code, Cap 33 R.E 2002 which stipulates;

> *"Where a defendant has set up a counter claim, the court may, if it is of the opinion that the subject matter of the counter claim ought for any reason to be disposed of by a separate suit, order the counter claim to be struck out or order it to be tried separately or make such order other order as may be expedient."*

The above provision was cited in a recent decision of this court in **Runway(t) Limited Versus WIA Company Limited and Cascade Company Limited,** Civil Appeal No 59 of 2015 (unreported), after which we said;

> *"In this case as we have elaborated above, neither an order for trying the counter claim separately or striking it out was made by the trial court....Under normal circumstances as the court acknowledged its existence it was duty bound to make a finding on it. That, the trial court did not do."*

With respect to Mr Nyoni however, the statutory requirement for the respondent to prove the specific claims as we have held but a while ago, strictly and similarly applies to the appellant. There is absolutely no proof of how the amount of Tshs 568,000/ allegedly being costs incurred by the appellant in the course of the demolition was arrived at. This ground of appeal is lacking in merits, it is dismissed.

For all those reasons we fault the High Court Judge for holding the demolition unlawful in disregard of the law under which the appellant legitimately acted. We also find the award of Tshs 500,197,551/ based on the alleged unlawful demolition to have been without support, first for the

reason that the demolition was lawful in law, and also for failure to prove it to the required standard. This appeal is therefore allowed with costs.

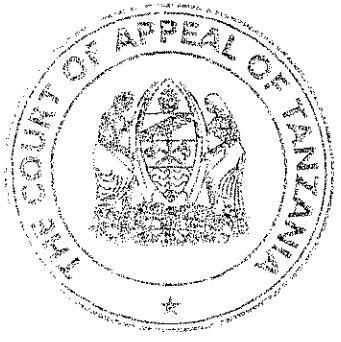
DATED at **ARUSHA** this 10th day of April, 2019.

S.S. MWANGESI
JUSTICE OF APPEAL

G.A.M. NDIKA
JUSTICE OF APPEAL

I.P. KITUSI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL