

**IN THE HIGH COURT OF TANZANIA**

**MWANZA DISTRICT REGISTRY**

**AT MWANZA**

**HC. CIVIL APPEAL No. 39 OF 2020**

*(Arising from the judgment of the District Court of Nyamagana in Civil Case No.11 of 2015 by Originating from Resident Magistrate Court of Mwanza)*

**DINA ANYANGO .....APPELLANT**

**VERSUS**

**BABU GARENDE SAMSON..... RESPONDENT**

**JUDGMENT**

30<sup>th</sup> November 2020 & 10<sup>th</sup> February, 2021

**TIGANGA, J**

This Judgment is in respect of an appeal filed by the appellant challenging the decision of the Court of Resident Magistrate of Mwanza in Civil Case No. 11 of 2015 in which the appellant was the defendant while the respondent was the plaintiff in which he was suing for the following orders;

1. An order declaring the defendant's act of closing the plaintiff's business as unlawful and unjustified.
2. An order compelling the defendant to open the plaintiff's business and store,

3. An order requiring the defendant the total sum of Tshs. 20,000,000/= for loss of business from the date of the closure of the said business
4. An order compelling the defendant to pay for the value of the goods thereon
5. Payment of general damages,
6. Costs of this suit, and,
7. Any other and further relief that this honourable court may deem fit and just to grant.

After full trial which was conducted before the trial court Hon. Ruboroga-SRM. The trial court decreed and ordered that;

- (i) The amount of Tshs.30,000,000/=which the third party received as a proceeds of renting the shop and store at plot No.200 Block U should be refunded to the defendant.
- (ii) The shop commodities transferred shifted by the third party from the shop and store at Plot No. 200 Block "U" be restored to the defendant.
- (iii) The third party was condemned to pay general damages of Tshs. 10,000,000/= for loss of business to the plaintiff.



- (iv) The shop and store be handed over to the plaintiff.
- (v) Costs of the suit be borne by the third party.

The decision aggrieved the appellant; she decided to appeal to this to court against that decision and filed one ground of appeal as hereunder stipulated;

- (a) That the learned trial magistrate erred in law and in facts on declaring the respondent owner of the shop and store after having found out that the third party had no mandate to transfer the shop and store to the respondent.

Wherefore she prayed that;

- Both the judgment and decree pronounced by the trial court by Hon. Ruboroga SRM on 06.05.2016 be set aside
- The appellant be declared the owner of the suit properties

The respondent in his reply informed the court that, the trial court did not center on the question of ownership of the disputed shop rather the issue of tenancy between the Appellant and the Respondent. Second, that basing

on the analysis and proper evaluation of the evidence on record, the trial court was correct to hold that the respondent was the lawful tenant of the shop and store in dispute against the mere allegation made by the appellant herein.

Hearing of the appeal was by written submission, in the submission filed by the appellant, she submitted that the appellant was the owner of the shop and store on plot No.200 Block "U" Rwagasore street Mwanza City by virtue of the decision in the District Court of Nyamagana at Mwanza in Matrimonial Case No.6 of 2012 between herself and her then husband one Kiganja, a decision which was appealed in the High Court Appeal No. 42 of 2013 which was dismissed by the decision that is exhibit D3. She submitted that after such a victory, she assigned her daughter one Rose Ghati Kiganja (Third party to operate the shop).

However in due course, the said third party invited the respondent to run the shop, and later without the appellants consent, sold it to the respondent. She went on in her submission that contrary to their agreement the third party had mismanaged the business and failed to pay back a loan previously obtained by the appellant and pay school fees for her young siblings. That caused the appellant to report the matter to police



who advised her to close the shop hence Civil Case No. 11 of 2015 of the District Court of Nyamagana at Mwanza from which this appeal lies.

She submitted further that, the trial court in its findings appreciated that the third party had no mandate to transfer the shop from her mother to any other person and went ahead to order the third party to return the shop commodities she had shifted from the shop to the respondent, and the money Tshs. 30,000,000/= she collected from the respondent be paid to the appellant.

She submitted that having so found, it was therefore not justified for the same court to decide that the same shop and store should be handed over to the respondent. In her opinion, after the court had found that the transfer of the shop from the third party to the respondent was illegal for the lack of capacity to transfer, it follows then to whether or not the issue at hand was tenancy (of the shop premises) the trial court was not supposed to hold that the said shop and store belong to the respondent while there was no transfer at all, as in law an illegal transfer can not result into ownership of property as the title cannot pass as held in the case of **Mohamed Iddi Mjasir vs Mrs Jayalaxmi Jayyantilal Joshi** [1993] TLR 274. He alerted that although the facts of the case are not exactly the

same as in this case but the case is relevant here as it dealt with a transfer of property illegally obtained.

In further building her case she cited the case of **Ramadhani Kambi Mkinga vrs Ramadhan Said** [1985] TLR 140, HC-Mapigano, J, (as he then was) held that,

When "A" knowingly or recklessly enters upon "B"'s land in circumstances that amount to a trespass and "B" promptly makes protest against his entry "A" is not legally entitled to be paid any compensation by "B" for any of the improvements he might have effected on the land in the course of the trespass.

She prayed at the end that, the appeal be allowed, the decision of the trial court be reversed, by declaring the appellant as the owner of the suit properties.

In his reply to the submission in chief the respondent submitted that, basing on the pleadings and the evidence adduced before the trial court the matter in controversy centered on the question of tenancy agreements entered between the parties herein and their respective landlords PW2 and PW3 and not the question of ownership of disputed premises.



He submitted that the testimony of PW1,PW2,PW3,DW1 and DW4 the third party, there is no controversy that the ownership of the shop and store are of PW2 and PW3 but the controversy was who the lawful tenant was by the time the cause of action arose.

In cementing the argument he differentiated the concept of ownership and tenancy, he submitted that the disputed premises had never formed part of matrimonial assets acquired by joint efforts of the appellant and her divorcee hence the court which included the disputed premises as **part of matrimonial assets misdirected itself**. He insisted that PW2 and PW3 were not parties in the matrimonial dispute nor were they called upon to testify, something which could bring different results had they been accorded the right to be heard.

He said that the trial court in paragraph 2 of the judgment acknowledged the existence of the lease agreement between him and the PW2 and went further that the respondent was the lawful occupant, not the owner, of the disputed premises

Responding to the grounds of appeal, he submitted that the evidence in exhibit P2,P3,P4 D4 and the testimony of PW1,PW2,PW3, DW4, (third

party) proves that the third party was the lawful tenant of PW2 and PW3 before transferring her interest in the premises to the respondent as evidenced by exhibit P2 four months before the expiry of her tenancy agreement, to cement on that he referred me to the page 14 of the typed proceedings. He also referred to exhibit P4 and at page 10 of the proceedings which shows that the third party was the lawful tenant.

Further to that, the respondent submitted that after the expiry of the lease agreement on 01/01/2015 the respondent entered into the new agreement that is exhibit P3 with the land lord PW2, Ramadhani Kigonza.

Submitting on the contradictions and credibility of the appellant, he submitted that there is no evidence tendered by the appellant proving that she was the lawful owner of the suit premises or a lawful tenant to contradict the testimony of PW2 and PW3 thereby failing to discharge the burden of proof as required under section 110 and 112 of the Evidence Act [Cap. 6 R.E 2019]

She submitted that the evidence of the prosecution was full of contradiction and deserves no any credit; he referred his court at page 23 and 24 of the typed proceedings which shows that her evidence was self



contradictory. He submitted that such contradictions affect the credibility of the evidence of the witness. He reminded the court of the principle in the case of **Goodluck Kyando vs The Republic** [2006] TLR 363 CAT that every witness is entitled to credence and must be believed, and his testimony accepted unless there are good and cogent reasons for not believing in witness.

He submitted that contradiction, inaccuracy and believability of the witness are one of the factors. He cited the case of **Nyakuboga Boniphace vs The Republic**, Criminal Appeal No.434 of 2006 CAT (Unreported) which gives the guiding principle for determination of the credibility of the witness, which includes;

*"the demeanors of a witness, coherence of the testimony of the witness, consideration of the witness's testimony in relation to the evidence of the witness, whether the evidence was legally obtained, whether it is credible and accurate, whether it is relevant, material and competent and whether it meets the standard of proof requisite in a given case or otherwise referred to as the weight of the evidence or strength or believability"*

He submitted that testing the evidence of the appellant, it goes without saying that it falls short of the requirement. He submitted that the allegation that the appellant is the owners of the disputed premises is misplaced, as during the hearing the appellant did not cross examine PW2 and PW3 on the issue of ownership, failure of which by necessary implication means she admitted that the two witnesses were owner of the disputed premises as reflected at page 14 and 15 of the proceedings.

He submitted that since the trial court admitted exhibit P4 without being contested, and considering the admission made by the DW1 during cross examination and the testimony of PW2 and PW3 [the Land Lords] and DW4 [3<sup>rd</sup> party] was the lawful tenant of the disputed premises in the year 2014. He in the end prayed the appeal to be dismissed with costs for want of merits.

That being the comprehensive summary of the record, the grounds of appeal and answers thereat, as well as the submission by the parties. In the course of making such a summary I find it pertinent to narrate albeit briefly what gave rise to the dispute at hand, the facts are that, PW2 and PW3 own a house which is the commercial premises at Rwagasore Street in Mwanza, they both tenanted their house to the third party PW2 rented



her a shop room while PW3 rented him a store. In the year 2014 four months before the expiry of the said tenancy, 3<sup>rd</sup> party decided to sell her tenancy to the respondent. A deal was concluded and the respondent took occupation and was introduced to the land lords that are PW2 and PW3. The facts are that after the expiration of the tenancy he bought from the 3<sup>rd</sup> party, the respondent entered into fresh tenancy agreement with the PW2 and PW3.

The defendant and the 3<sup>rd</sup> party are mother and daughter respectively, the shop in dispute was initially owned by the defendant who says that she assigned the same to the 3<sup>rd</sup> party to run it. On how the shop changed hands from the defendant to her daughter there is a conflicting statement between the defendant and the 3<sup>rd</sup> party, while the appellant said that she just assigned the same to the third party to just run, while the ownership of the business remained to the appellant, the 3<sup>rd</sup> party said that, the business including the ownership of it was transferred to her.

It is on that premises that the 3<sup>rd</sup> party sold the business premises to the respondent. From the evidence, it has not been disputed that the owner of the houses in which the business which was transferred was located are PW2 and PW3. Therefore according to the evidence the two

recognize the respondent as their tenant having been introduced to them by the 3<sup>rd</sup> party. This means the dispute was not on the ownership of the premises / the room, but the business which was being carried out in those rooms. Which means the appellant having assigned her business to the 3<sup>rd</sup> party, had the claim against the 3<sup>rd</sup> party, not any other person; it was therefore on that base that the trial court was satisfied that the business was of the appellant and that the third party disposed the same without her consent. This is reflected in the findings of the trial court which found and declared the 3<sup>rd</sup> party to be liable;

- (i) To pay the amount of Tshs.30, 000,000/=which the third party received as a proceeds of renting the shop and store at plot No.200 Block U should be refunded to the defendant.
- (ii) To restore the shop commodities transferred/shifted by the third party from the shop and store at Plot No. 200 Block "U" to the defendant.

The court also realized that the respondent was the bonafide purchaser who by all standard was made to believe that the business was the property of the 3<sup>rd</sup> party. The belief can be ascertained from the following, one, the fact that the 3<sup>rd</sup> party was managing the business, two, that the



business documents were in her names, three, she was recognized by the land lords and therefore introduced the respondent to them.

All these in my opinion are sufficient to make the respondent a *bonafide* purchaser in that business. If misdirection then it was the 3<sup>rd</sup> party who misdirected him that is why the trial court found and correctly so that, any loss caused to the respondent then it was caused or attributed by the 3<sup>rd</sup> party, that is the reason of the order that the 3<sup>rd</sup> party should pay general damages of Tshs. 10,000,000/= for loss of business to the plaintiff and that the shop and store be handed over to the plaintiff as he occupied them bonafide. It was also on that base that the same 3<sup>rd</sup> party pays costs of the suit.

I am aware that the ground of appeal is basically raising a complaint that after finding that the 3<sup>rd</sup> party had no mandate to transfer the shop and store to the respondent, the trial court was not justified to declare the respondent the owner of the shop and store. As the evidence before the trial court stands, the 3<sup>rd</sup> party admits to have sold only the four months tenancy, she left with all shop items and commenced new business somewhere else.

It is thus evident, that the only interest in what the 3<sup>rd</sup> party sold to the respondent which was the interest of the appellant for that matter, was the four months tenancy which expired four months later on 24/12/2014. This means at the time when the case was filed before the trial court the tenancy had already expired and therefore the interest of the appellant was no longer there. The respondent had already commenced the tenancy agreement of his own with the landlords.

That said, it is instructive to find that the trial court was justified to see no problem in the tenancy of the respondent, therefore to declare the tenancy to be proper. That said, I find the trial court was justified to hold as it did, I find the appeal to be devoid of merits, it is hereby dismissed with cost. The decision of the trial court is upheld. Right of Appeal explained

It is so ordered.

**DATED** at **MWANZA**, this 10<sup>th</sup> day of February, 2021



  
**J. C. Tiganga**

**Judge**

**10/02/2021**