**Southern Tanganyika Game Safaris and another v Ministry of Natural**

**Resources and Tourism and others**

**Division:** High Court of Tanzania at Dar-es-Salaam

**Division:** High Court of Tanzania at Dar-es-Salaam

**Date of Judgment:** 4 march 2004

**Case Number:** 301/02

**Before:** Kimaro J

**Sourced by:** LawAfrica

**Summarised by:** A Mwanzia

*[1] Contract – Lease agreement – Breach – Non-payment of rent and taxes – Whether lease lawfully terminated – Improvement done on rental property without landlord’s consent – Whether lessee may recover value of improvements.*

**JUDGMENT**

**KIMARO J:** The plaintiff and the second defendant created a contractual relationship through a lease agreement (Exhibition P1). The plaintiff is a limited liability company which deals with photographic tourism. The lease agreement allowed the plaintiff to use and occupy for its guests and tourists tents, camps outhouses, airstrip motor vehicles and boats then used and occupied by the second defendant at a place known as Mbuyu Safari Camp situated at Selous Game Reserves. The rent payable to the second defendant under the lease agreements was USD 30 000 or its equivalent in Deutsche Marks (DM) yearly. The second defendant is a subsidiary/sister company of the third defendant. The third defendant holds 100% shares in the second defendant. Under Exhibit P1, the plaintiff was obligated to pay all taxes and game park fee to the Ministry of Natural Resources and Tourism as well as submission of returns. That is why the first and fourth defendant are also joined in the suit. The lease agreement was for 10 years, starting from 29 June 1994 (clause). The plaintiff avers that there was a frustration of the contract which resulted into the termination of the contract. The plaintiff is praying for judgment and decree against the defendants jointly and severally for the following orders:

(i) Declaration on the lawfulness of the lease up to the completion of the lease period.

( ii) Specific damages of USD 60 000 and others mentioned in the plaint.

(iii) General damages.

(iv) Interest

( v) Costs. All the defendants denied liability. The issue framed for the determined of the Court are:

(i) Whether the lease agreement was lawfully terminated.

( ii) Whether the first defendants closure of the impugned camp was lawful.

(iii) Whether the plaintiff suffered loss as a result of the said closure.

(iv) To what relief’s are the parties entitled to.

On the first issue both Mr Chidowo, the Learned State Attorney who appeared for the first and fourth defendants and Mr *Mujulizi*, the learned advocate who appeared for the third defendant submitted that the first issue should be answered affirmatively because the circumstances justified the termination of the same. They both said that the evidence tendered by the defence witnesses and the plaintiffs own admission, was that the plaintiff fell in arrears of reserved rent and government taxes. The Court was referred to the terms of the lease agreement on the payment of rent and taxes as well as section 37(1) of the Law of Contract Ordinance, Chapter 433. Mr *Maira*, the learned advocate who appeared for the plaintiff on the other hand submitted that the question of lawful termination does not arise because the lease agreement was void *ab initio* because it was perpetuated by fraud on the part of the second defendant. His contention was that there was nondisclosure of information by the second defendant. With greatest respect to Mr *Maira*, such a submission for a summing up of the case is a misplacement. The validity of the lease agreement is not what forms the cause of action for the plaintiff in this case. It was not pleaded. It was not an issue in the case. Nor was any evidence led by the plaintiff on this aspect. The case of *Vidyarthi v Ram Rakha* [1957] EA 527 is an authority on what the contents of final submissions should relate. They should relate to the pleadings and the evidence which was adduced in the trial. Final submissions are not themselves evidence. They are aimed at providing a guide to the Court in resolving the issues before the Court. They must therefore be directed to what was pleaded and the evidence that was led during the trial. The clarification having made, I will say that the submissions by Mr *Maira* on the first issue cannot be considered, let alone be accepted by the Court. They do not relate in any way to the plaintiffs pleadings, the issue which has been referred to, nor is there any evidence to support linkage of the submissions made by Mr *Maira* in respect of the first issue. Both Mr Chidowo and Mr *Mujulizi* submitted quite correctly, that the relationship between the landlord and tenant was contractual and parties to the lease agreement are duty bound to comply with their respective covenants of lease agreement. Under clause 7(*a*) and (*c*) of the lease agreement, (Exhibit P1), the plaintiff was obliged to pay all taxes and game park fees payable to the Ministry of Lands Natural Resources and Tourism. The testimony of the defence witnesses Augustine Mundala (DW1) and Eliaezer Mwakilwa (DW2) was that the plaintiff fell into arrears of entry fees for tourists as well as conservation fees. Mr Agricola Athanas Magoho (DW3) told the Court that the plaintiff defaulted in payment of rent to the landlord. The plaintiff admitted falling back in the payment of the entry fees and conservation fee. He associated his default with the September 11 bombing of the United States of America Embassies in Dar-es-Salaam and Nairobi as well as the bombing of the hotels in Zanzibar and Mombasa. He said terrorist activities were a setback in the tourist industry worldwide. They resulted in higher operational costs than the revenues. As regard the default in payment of rent this evidence is not disputed. There is evidence showing that prior to the closure of the camp, the plaintiff was reminded and warned to make good the arrears of reserved rent and government taxes (Exhibit D2). A letter dated 3 March 2000 (Exhibit D5) contains an express admission by the plaintiff of his failure to pay the outstanding park fees. Following the plaintiff’s persistent failure to comply with the express terms of the lease agreement, the plaintiff was served with a notice of breach of the terms and conditions of the lease agreement (Exhibit D3). That was on 28 May 1999. Even then, the plaintiff ignored and or neglected compliance of the terms and conditions of the lease agreement. A notice of termination of the lease agreement pursuant to clauses 7(*c*) and (*j*) and 9(*c*) was served on the plaintiff on 15 June 1999. The plaintiff’s main complaint is that the lease agreement was terminated by the Minister without authority because the lease agreement was not made between the plaintiff and the Minister. The plaintiff tendered into court letters of cancellation of the agreement authored by the Minister. They were admitted by the Court as Exhibit P2 and P3. The evidence on record shows that by Exhibit D3, the plaintiff was notified of the breach of terms and conditions of the lease agreement. These were payment of the reserved rent on the days and manner agreed upon, payment of taxes and game park fees to the ministry of lands and natural resources as well as submission of returns and alteration or addition of any of the premises or camp without the consent of the lessor. These are the covenants in clauses 7(*a*), 7(*c*) and 7(*j*) respectively. Exhibit D3 is dated 28 May 1999. DW3 said the termination followed on 15 June as per Exhibit D4. The lease was terminated on 15 June 1999. Exhibit D5 dated 3 March 2000 is clear evidence that the plaintiff received Exhibit D3 but did not clear the outstanding arrears of rent and taxes. It was only when the Minister for natural resources and tourism wrote to the plaintiff that the plaintiff seriously engaged in measures in defence of its position. It cannot be said that the lease agreement was terminated by the Minister for tourism on 3 June 2002. The lease agreement was terminated by the lessor on 15 June 1999 and it was lawful terminated. Section 37(1) of the law of contract ordinance camp 433 requires the parties to a contract to perform their respective promises. The section reads: “The parties to a contract must perform their respective promises, unless such performance is dispensed with or excused under the provisions of this ordinance or any other law”. The plaintiff having failed to comply with the clauses of the lease agreement that required him to pay rent and relevant taxes under the lease agreement, the contract was lawfully terminated. Mr *Maira*’s submission for the second issue was that the first defendant was not privy to the lease agreement and had no authority to close the impugned camp. The plaintiff was making payments to the first and second defendant until they demanded the concession letter from the second defendant until they were denied. Still they continued to pay the first defendant the outstanding fees. Mr *Maira* made reference to the bomb attacks referred to herein before and how they affected the tourist business but still the plaintiff kept on paying taxes to the first defendant. Both Mr Chidowo and Mr *Mujulizi* responded by saying that the first defendant was entitled to close the impugned camp after the plaintiff defaulted in paying taxes. The plaintiff has admitted failure to pay the taxes and fell in arrears. PW1 Alfred Moozer, the Executive and managing director of the plaintiff said: “We conceded there was some fees due”. Exhibit D5 is a clear admission by the plaintiff of being in arrears. Therefore, it is not true as submitted by Mr *Maira* that the plaintiff was paying taxes in accordance with the agreed schedule. The evidence on record shows that the lease agreement was terminated by the second defendant way back in June 1999 but the plaintiff continued to carry on business. The closure of the camp came after the lease was lawfully terminated by the second defendant because of the plaintiff’s failure to honour the terms of the lease agreement. Although the plaintiff claimed that the lease agreement was not terminated no evidence was led to prove the existence of the lease agreement after the second defendant terminated it. In terms of section 110(1) and (2) of the Evidence Act, 1967 the burden was on the plaintiff to prove the existence of the lease agreement, which was not done in this case. The third issue relates to loss purported to have been suffered by the plaintiff because of the closure of the camp. Mr *Maira* submitted that the plaintiff invested about TShs 423.4 million to change the camp and made it a beautiful place loved by tourists after finding it in a dilapidated state when the plaintiff started operations. The closure of the camp frustrated all the investments. He said the period in which the plaintiff ran the business built good relationships, goodwill and reputation within and outside Tanzania which were made on trust and years of hard work but all have now been destroyed. Mr Chidodwo’s response was that the plaintiff was granted by the first defendant temporary permission to extend camp activities up to November for purposes of enabling the plaintiff to accommodate the bookings made up to 7 November 2002. He said bookings made thereafter were done at the plaintiff’s own risk and the first defendant cannot be held liable. Mr *Mujulizi* on the other hand submitted that the improvements alleged to have been done by the plaintiff on the rented premises was another breach. The lease agreement required the plaintiff to have a prior approval of the lessor – second defendant (clause 7(*j*) of Exhibit P1) which the plaintiff did not have. Clause 7(*j*) of Exhibit P1 reads: “The lessee hereby covenants with the lessor as follows: (*j*) Not without the previous consent in writing of the lessor or his agent to make or permit to be made any alteration or addition to any of the premises or in the camp or outmain or injure or alter any of the walls or timber of any structure. The lessee can erect new tents/buildings or make improvements to the property with the consent of the lessor, such consent not to be unreasonably withheld”. Mr *Mujulizi* submitted correctly that the improvements effected by the plaintiff in the context demonstrated by the plaintiff were illegal and unjustified for want of consent from the second defendant. In this perspective the plaintiff cannot be entitled to damages against the second and third defendant. Not even against the first defendant because the lease agreement was terminated in June 1999 and the plaintiff was only granted temporary extension up to November 2002. If he went beyond that period and made advanced bookings up to this year, then the plaintiff must bear the consequences alone. The circumstances as they stand, do not support the plaintiff’s contention that it suffered loss as a result of the closure of the camp. The lease agreement was lawfully terminated because of breach of the terms and conditions of the lease agreement by the plaintiff well before he made those bookings. Lastly, is the relief(s). The plaintiff having failed to establish the claims it is praying for, the suit is dismissed with costs.

For the plaintiff:

*Mr Maira*

For the first and fourth defendants:

*Ms Teri*

For the second and third defendants:

*Mr Mujulizi*