IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MWARIJA, J.A., LILA, J.A., And KWARIKO, J.A.)

CIVIL APPEAL NO.6 OF 2017

AVIT THADEUS MASSAWE..... APPELLANT

VERSUS

ISIDORY ASSENGA ..... RESPONDENT

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

(Sumari, J.)

Dated 16th day of June, 2016 in

(Land Case No.8 of 2014)

.....

JUDGMENT OF THE COURT

11th March, & 24th July, 2020

LILA, J.A.:

This appeal was first heard on 7/12/2018 and instead of determining the appeal on merit we, in our order rendered on 14/12/2018, ordered an additional evidence be recorded by the trial High Court and be certified to the Court so as to enable it compose a judgment. We directed the High Court, the parties together with their respective counsel and a high ranked Land Officer from the Land Office in Moshi District to visit the *locus in quo* so as to identify Plots Nos. 16 and 17 Kindi Msasani within Moshi District and locate on which

Plot the house (the suit property) is. We were inclined to so order upon our realization that central to the dispute between the parties to this appeal was the suit property, the location of which the parties conflicted. We are grateful to the work well done by the High Court (Twaib, J. as he then was) in its precise compliance with the order. We now proceed to determine the appeal.

The pertinent facts that gave rise to the present appeal may be recapitulated thus. One Richard Kweka (DW3) happened to own two plots which were adjacent to each other. They were Plots Nos. 16 and 17 Kindi Msasani within Moshi District. One of them was developed in that a house, the suit property, was built on it. In the suit as well as in his evidence in court the appellant claimed that, that development was done on Plot No. 16 and was the one sold to him by DW3. He wanted the respondent, to move out of the suit house contending that he was a trespasser. To effectuate his desire, he instituted a suit against the respondent before the High Court. Conversely, the respondent firmly refuted the appellant's assertion and, in contrast, claimed that the development was effected on Plot No. 17 and that the unfinished house was sold to his son one Deo Asenga (DW2) and he further developed it. He claimed therefore that he was occupying

that house after being given the same by his son (DW2). He therefore strongly resisted the appellant's move.

As we indicated in our order dated 14/12/2018, both parties called witnesses at the trial to prove their respective claims. Two witnesses testified for the appellant (then plaintiff) namely the appellant and one Charles Gabriel Laseko (PW2), a Land Surveyor from Moshi District Land Office. The appellant (PW1) told the trial High Court that he bought the suit house located on Plot No. 16 from DW3 at TZS 96 million on 25/4/2013 but was not thereby issued with a Certificate of Tittle No. 28084 L. O. 192645 (Exhibit P1) because it was then with the bank (KCB) following DW3's failure to service the loan that was advanced to him. He said the dispute arose when he went to the house with a tenant so as to let it at TZS. 400,000/= per month only to find the respondent was in occupation of the suit property. Assisted by the Survey Plan (exhibit PE2), PW2 told the trial court that the suit property was on Plot No. 16 and that Plot No. 17 was yet to be developed. He said the deed plan contained in the Certificate of Tittle does not show any development on the land as opposed to Survey Plan which shows that the plot had been developed.

On his part, the respondent (DW1) told the trial court that he was in occupation of the house built on Plot No. 17 which was bought by his son one Deo Asenga (DW2) from DW3. That assertion was supported by DW2, his son, who told the trial court that he bought an unfinished house located on Plot 17 from DW3 at TZS. 105 Million inclusive TZS. 48 Million which he paid to KCB bank for the loan DW3 had taken. He said he thereafter renovated it and let the respondent live in it. DW3 also supported the respondent's assertion for he said he owned plots Nos. 16 and 17 and that he developed Plot No. 17 on which he built a house and later sold it to DW2 when the KCB wanted to sell it following his failure to service a loan of TZS. 50 Million he had taken. As for Plot No. 16, he said that he used it as a bond to the appellant from whom he had borrowed TZS.30 Million.

As it were, the High Court (Sumari, J. as she then was) after scrutinizing the competing evidence by both sides, found for the respondent and held that the house sold is on Plot No. 17 and it belonged to DW2 although, by slip of the pen, she indicated that it belonged to DW3. In the course of her judgment, the learned judge discredited PW2 on the ground that he surveyed the area without

involving the neighbours hence the survey was not professionally done. The suit was thereby dismissed with costs.

The above finding by the High Court aggrieved the appellant hence the present appeal which is grounded on these complaints:-

> *"1. That, the learned High Court Judge erred in law and fact by holding that the house in dispute is located on Plot No.* 17 *contrary to evidence adduced at the trial.*
> *2. That, the learned trial Judge erred in disregarding the testimony of PW2 and the weight of exhibit P2 which clearly proved that Plot No.16 has a house on it.*
> *3. That, the learned trial Judge of the High Court erred in fact and in law by finding that the Appellant who was then Plaintiff is not the owner of Plot No. 16 a fact not disputed by either party and contrary to evidence adduced at the trial.*
> *4. That, the learned trial Judge of the High Court erred in dismissing the suit."*

When the appeal was called on for hearing before us on 7/12/2018, Mr. Elikunda George Kipoko, learned counsel, appeared

for the appellant and Ms. Elizabeth Minde, learned counsel, appeared for the respondent.

In their respective arguments, both counsel reiterated what the witnesses for their respective parties told the trial High Court and maintained the positions they took before the High Court. In a nutshell, Mr. Kipoko, who also filed written submission, was insistent that the suit property is on Plot No. 16 and was sold to the appellant by DW3 at TZs 96 million. Arguing orally before us following her failure to file reply submission, Ms. Minde maintained that the suit house is on plot No. 17 and was sold to DW2 by DW3. From those telling by the counsel for the parties it was apparent that the controversy between the parties centered on which plot is the suit house located. Unfortunately though, despite the glaring uncertainty created regarding the actual location of the suit house, the High Court did not, given the particular circumstances of the case, find it necessary to visit the *locus in quo* to satisfy itself on the location of the suit house which move, in our view, would have made it easy for it to determine the suit justly and with certainty. That prompted us to exercise our powers under Rule 36(1)(b) of the Tanzania Court of Appeal Rules, 2009 to direct the High Court to collect additional evidence respecting

the actual location of the suit property and certify the same to the Court. We accordingly reserved the judgment to await the certified additional evidence.

In compliance with the Court's order, the High Court visited the area in the company of Mr. George Makelula Kamwela (CW1), a Land Surveyor, who confirmed that Exhibit P2 was a proper Survey Plan of the area and that the house is on Plot No. 16. He was insistent that Plot No. 17 was not yet developed. The additional evidence was certified to the Court and the High Court opined that CW1 was of an impeccable credibility.

Upon receipt of the certified additional evidence parties were, again, summoned to appear before us and they dully appeared on 11/3/2020. Mr. Caessar Shayo and Elizabeth Minde, learned counsel, appeared for the appellant and the respondent, respectively.

Addressing the Court on the certified additional evidence, both counsel had no issue with it as they both agreed that the suit house is on Plot No. 16. To be specific, Mr. Shayo told the Court that, according to the additional evidence, the suit house is on Plot No. 16 and urged the Court to allow the appeal. Ms. Minde, on her part,

unreservedly told the Court that she had no dispute with the contents of the additional evidence. She, however, expressed her concerns over the rights of DW2, the real buyer of the suit property, who was not made a party to the proceedings instead was just a mere witness on the one side and the bank on the other side from which DW3 obtained loan and the suit house used as a collateral.

As hinted above, the crux of the dispute between the parties is centered on trespass to a landed property. Before the High Court there were two competing propositions. One was by the appellant who claimed that the respondent had entered and occupied the suit property which he had bought from DW3 and that the suit house was located on Plot No. 16. The second one was by the respondent who vehemently disputed the claim and alleged that the suit house is located on Plot No. 17 and that he was in occupation of it after being assigned to live in it by his son (DW2) who bought it from DW3.

We think, before we dwell on the resolve of the appeal, we should expound the legal principles governing the instant dispute. We will start with the concept of trespass to land. Mr. C. S. Binamungu in his book LAW OF TORTS IN TANZANIA (henceforth Binamungu) defines the concept at page 35 to mean:-

"...entering, remaining or causing an object to fall on the premises/land in the possession of another without permission and/or without justifiable cause."

The above definition augur well with the definition adopted in a highly persuasive decision by the High Court in the case of **Frank Safari Mchuma vs shaibu Ally Shemdolwa** [1998] TLR 280 at page 288 that trespass to land entails unjustified intrusion of one person upon another's land. In that case the High Court (Lugakingira, J. as he then was) had this to say:-

*"By definition trespass to land is unjustifiable intrusion by one person upon the land in the possession of another. It has therefore been stated with a light touch that: "If the defendant place a part of his foot on the plaintiff's land unlawfully, it is in law as much as a trespass as if he had walked half a mile on it" (**Ellis v. Loftus Iron Co.** (2) per Coleridge C. J. at P. 12)..."*

The learned author (Mr. Binamungu) goes on, at page 36, to give the ingredients of the tort as being entering (physically or through an object) or remaining on the land, possession of premises. He

further states that a tort of trespass is committed when one enters unto the land that is in occupation of another not necessarily in his/her ownership like tenants and licensees without permission or authority. He elaborates that in trespass cases the tortfeasor should be having neither permission (express or implied) nor statutory authority. Further, the learned author, at 37 and 38, explains the available defences as being statutory authority and right of possession of the land. In respect of remedies available to the claimant, he lists them down to be perpetual injunction and monetary compensation (damages).

In another book, Law of TORTS by Mr. R. K. BANGIA, Twenty-First Edition, 2008 (henceforth R. K. Bangia) at page 405, trespass to land is defined to mean interference with the possession of land without lawful justification and it is either direct or through some tangible object. That is to say trespass could be committed either by a person himself entering the land of another person or doing the same through some material object. We are convinced that the law on trespass to land is as propounded above and we fully associate ourselves with.

It is noteworthy that five issues were drawn at the commencement of the trial for the parties to lead evidence in their verge to justify their propositions. These are:-

1. Who is the lawful owner of the Plot No. 16, suit property.
2. Whether there is a house on Plot No. 16, suit property.
3. Whether the defendant resides in house built on Plot No. 16, suit property.
4. Whether the defendant resides on Plot No. 17
5. What reliefs the parties are entitled.

Closely examined, the issues raised and the parties' arguments before the High Court were intended to enable the trial court to resolve three crucial issues, namely; the location of the suit house, who owned it and whether DW1's occupation of it was justifiable. Needless to repeat in so many words, the High Court, after examining the competing evidence of both sides, found for the respondent (DW1) and dismissed the suit.

In the present appeal, the Court, considering the nature of the grounds of complaints lodged, is being asked to reconsider the

evidence and reverse the High Court decision hence the relevance of the above recited issues.

We have carefully considered the additional evidence availed to the Court to which the counsel for the parties had no issues with. It is both pre-emptive and conclusive of the fact relating to the location of the suit house. It unveiled a somewhat unison tale, the whole truth. CW1, a reliable Land Officer, who participated in the visit to the *locus in quo* used a similar Survey Plan PW2 used during his testimony (Exh P2) and told the High Court that the suit house is on Plot No. 16 and that Plot No. 17 was yet to be developed. Even before us, neither of the counsel entertained doubts on his credibility or the Survey Plan (Exh P2) used in locating the plots and the suit house. They were agreed that the suit house is on Plot No. 16.

Given the circumstances, there is therefore no dispute that Plots No. 16 and 17 are undoubtedly not one and the same. A glance at the appellant's evidence shows that his claim was in respect of the respondent entering and occupying his house situated on Plot No. 16 whereas the respondent disputed the claim on the basis that he was living in a house situated on Plot No. 17. It is apparently clear, therefore, that had the parties exercised due diligence at the time of

purchasing the suit house by observing the famous principle of "buyer beware" and particularly the respondent, perhaps no dispute would have arisen. The parties locked horns over the claims which were founded on two different plots. It is undisputable therefore that the suit house was located on Plot No. 16 and it belonged to the appellant. The respondent had, therefore, no right over it.

The above finding resolves grounds one (1) and two (2) of appeal which challenged the High Court's findings on issues number 2, 3 and 4. We accordingly hold that the disputed house is located on Plot No. 16 and that PW2 and exh. P2 were reliable. The learned trial judge was therefore in error when she held otherwise. We allow the two grounds of appeal.

Ground three (3) of appeal raises no difficulty at all for these two main reasons. **One**, we have demonstrated that the parties were contesting over on which plot was the disputed house built. The appellant's claims were in respect of a house built on Plot No. 16 while the respondent's claim was in respect of a house allegedly built on Plot No. 17. The issue of who owns plot No. 16 does not therefore arise. On the undisputed evidence by CW1, the house sold to the appellant by DW3 is on Plot No. 16 hence it is owned by the appellant.

Two, the appellant, in his testimony, told the High Court that he bought the suit house located on Plot No. 16 from DW3 at TZS 96 Million on 25/4/2013 and transferred its tittle into his name. On this point, DW3 who formerly owned Plots Nos. 16 and 17 had it that he mortgaged the suit house on Plot No. 17 to KCB Bank as security for TZS 50 Million he had borrowed therefrom. In respect of Plot No. 16 he said he placed it in the hands of the appellant as bond for the TZS 30 Million he borrowed from him. This is what he was recorded to have told the trial court:-

> *"As for Plot No. 16 it is still my property but I handed it over to Mr. Avit Thadeus Massawe as bond for he borrowed me Tshs. 30 million on agreement he will return it to me after I paid him. So far I have not paid him for my business went wrong. However, as of now I'm ready to pay him back as it thanked God my business is now firm."*

It seems clear to us that even DW3 worked under a misconception that the suit house is on Plot No. 17. That was proved wrong by CW1. Be that as it may, it follows therefore that the appellant's ownership of the suit house on Plot No. 16 was not contested. He was in possession of the suit house at the material time.

In addition, the respondent conceded being in occupation of the suit house. He had therefore intruded in the house which was in possession of the appellant. The respondent's commission of the tort of trespass was thereby established. That said, ground three (3) of appeal is allowed.

The plain impressions we get from our examination of the whole evidence on record is that the respondent (then defendant) honestly believed that he was living in a house situated on Plot No. 17. That notwithstanding, the legal status of the respondent never changed. On that, we are highly impressed by the High Court's observation in the case of **Frank Safari Mchuma vs shaibu Ally Shemdolwa** (supra). In that case among other arguments raised by Mr. Mchora, learned counsel for the defendant, was that the defendant's entry upon the plaintiff's land cannot be classified as willful and unjustified since he had taken all steps to acquire title over the disputed plot. The High Court held, and rightly so in our view, that;-

> *"Be that as it may, this and other processes listed by learned counsel do not alter the legal position, namely, that where entry upon land of another is intentional, it is actionable even though made under a mistake of law or fact*

and even though the defendant honestly believes that the land is his own or that he has right of entry on it: ***Conway v. Winpey & Co.****(5) at page 273. It is on this footing that an action for trespass lies to determine a disputed title to land. I am satisfied from all considerations that the defendant is a trespasser."*

The above exposition of the law is well elaborated by R. K. Bangia at page 407 of his book where he says:-

"Trespass is actionable per se and the plaintiff need not prove any damage for an action of trespass. "Every invasion of property, be it ever so minute, is trespass." "Neither use of force nor showing any unlawful intention on the part of the defendant are required. ***Even an honest mistake on the part of the defendant may be no excuse and a person may be liable for the trespass when he enters upon the land of another person honestly believing it to be his own..."*
(Emphasis added)

On the above stated exposition of the law, the respondent's honest belief notwithstanding, he remained to be a trespasser to the

appellant's suit property. In all, the learned Judge erred to dismiss the appellant's suit. We accordingly allow ground four (4) of appeal.

To recapitulate, the appellant had claimed for various reliefs including eviction of the respondent from the suit property, perpetual injunction restraining the defendant and/ or their agents from dealing with the suit property, special damages at the rate of TZS. 400,000.00 from 1st June 2013 to the date of full payment, general damages for trespass and any other relief the Honourable Court deemed fit to grant. Those claims constituted issue number five (5). Such reliefs were not considered following the suit being dismissed. Upon the appeal succeeding, we are obligated to consider them.

It seems to us that the appellant's claim for payment of specific damages at the tune of TZS 400,000.00 per month from 1st June to the date of full payment, is grounded upon the alleged lease agreement he would have entered with the prospective tenant which deal could however not materialize on account of the respondent's refusal to vacate from the suit property. This being a claim for special damages, the legal position is that they should be specifically pleaded and strictly proved. We are fortified in that position by the Court's decision in the unreported case of **STANBIC BANK TANZANIA**

LIMITED vs ABERCROMBIE & KENT (T) LIMITED, Civil Case No. 21 of 2009 wherein the Court cited two persuasive decisions expounding on that position. First, the Court cited Lord Macnaghten in **Bolag v Hutchson 8** [1950] A.C. 515 at page 525 which laid down what we accept as the correct statement of the law that special damages are:-

> *"... such as the law will not infer from the nature of the act. They do not follow in the ordinary course. They are exceptional in their character and, therefore, they must be claimed specially and proved strictly."*

The Court also cited its decision in **Zuberi Augustino v Anicet Mugabe,** [1992] TLR 137, at page 139 where, in the same tone, it said:-

> *"It is trite law, and we need not cite any authority, that special damages must be specifically pleaded and proved."*

The question then is whether the special damages of TZS 400,000.00 per month were specifically pleaded and proved. We have no doubt that such claim was pleaded as reflected in paragraphs 7

and 12(d) of the plaint. Unfortunately, however, this is what the appellant told the trial court to justify grant of such a relief:-

> *"I had agreed with tenant to pay Tshs. 400,000/= per month and after the trespass refused to move out the house, I could not perform the agreement. He trespassed. Had it being (sic) he moved out of the house, I could get into an agreement with the tenant..."*

We think the claim was not sufficiently proved. There was no proof of how that amount was arrived at and even the prospective tenant did not testify to endorse what the appellant had told the trial court on the said agreement. Worse still, the said lease agreement was not tendered as exhibit. The bare assertion by the appellant fell far short of meeting the legal requirement for the grant of specific damages.

The appellant also claimed for payment of general damages for trespass. As already stated above, trespass to land is actionable *per se* and the plaintiff need not prove actual loss or damage. The plaintiff is entitled to award of damages for interference or dispossession termed in the legal arena as mesne profits. (See R. K. Bangia at page 411, **Frank Safari Mchuma vs Shaibu Ally Shemdolwa** (supra)

and Binamungu at page 38). Just for clarity, in the cited case, the High Court, addressing the question of damages, rightly so in our view, stated that:-

> *"Despite the absence of the argument for the plaintiff, this question has to be addressed since trespass is actionable per se without proof of actual loss. The rationale for this is that acts of direct interference with another's possession are likely to lead to a breach of the peace and the policy of the law therefore demands that the plaintiff be relieved from the requirement of proving damages."*

The law on general damages in our jurisdiction as well as how the same can be assessed was, again, well propounded in the case of **STANBIC BANK TANZANIA LIMITED vs ABERCROMBIE & KENT (T) LIMITED** (supra) wherein the Court, explicitly, said:-

> *"Again quoting from Lord Macnaghten in the* ***Balog*** *case mentioned earlier, general damages are:-*
>
> *... such as the law will presume to be the direct, natural or probable consequence of the action complained of.*

The Court went on to quote that:-

> *"Damages, generally, are:-*

That sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been if he has not sustained the wrong for which he is now getting compensation or reparation. See Lord Blackbum in ***Livingstone v Rawyards Coal Co.*** *(1850) 5 App. Cas. 25 at page 39. Asquith, C.J. in* ***Victoria Laundry v Newman*** *[1949] 2 K.B. 528 at p. 539 said damages are intended to put the plaintiff ... in the same position, as far as money can do so, as if his rights had been observed."*

We also find relevant to our case, what was stated by the Court regarding general damages in the case of **Tanzania Sanyi Corporation vs African Marble Company Ltd** [2004] TLR 155:-

"General damages are such as the law will presume to be the direct, natural or probable consequence of the act, complained of, the defendant's wrong doing must, therefore, have been cause, if not a sole or a particularly significant cause of damage."

We gather from the above expositions of the law that general damages are somehow in the form of compensation for the

inconvenience suffered by the plaintiff as a consequence of the defendant's action. We are, therefore, of the view that courts are enjoined to consider the situation under which the party affected was put and the inconvenience caused so as to enable them not only to make an order that he should be recompensated for it but also justly quantify the extent of compensation. Otherwise, any amount to be awarded will be out of speculation. On that point we are persuaded by the observation by Lord Dunedin in the case of **Admiralty Commissioners vs SS Susquehanna** [1950] 1 All ER 392 where he said:-

> *"If the damage be general, then it must be averred that such damage had been suffered, but the quantification of such damage is a jury question."*

The above observation is in line with the definition of general damages given by **Black's Law Dictionary, 7th Edition** that;-

> *"Damages that the law presumes follow from the type of wrong complained of. General Damages do not need to be specifically claimed or proved to have been sustained."*

Similar principles were pronounced by the Court in the case of **P. M. Jonathan vs Athuman Khalfan** [1980] TLR 175 at page 190 where it stated that:-

> *"The position as it therefore emerges to me is that general damages are compensatory in character. They are intended to take care of the plaintiff's loss of reputation, as well as a solarium for mental pain and suffering."*

In the present case, we are now certain that the respondent was a trespasser and thereby denied the appellant a peaceful enjoyment of the suit house. The respondent unjustifiably intruded and occupied it. Against this fact and on the authorities cited above, the appellant is entitled to compensation, a consolatory award. Admittedly, the assessment of the quantum is not an easy task. However, all the circumstances considered, we think, an award of TZS 15 Million (Say Tanzania Fifteen Million Shillings) will meet the ends of justice in this case. We accordingly award that amount as compensation (general damages) to the appellant.

Lastly, it is obvious that the immediate remedy available to a successful party who has been unjustifiably dispossessed of a certain property is to recover it back so as to enable him have a peaceful

enjoyment of it. That is not achievable unless the trespasser is evicted or ejected from the property. The appellant had prayed before the High Court for an order of eviction and perpetual injunction against the respondent and/or his agents from dealing with the suit property. We accordingly grant those orders.

All said, the appeal is hereby allowed to the extent indicated above with costs. The respondent is hereby ordered to immediately give vacant possession of the suit property to the appellant.

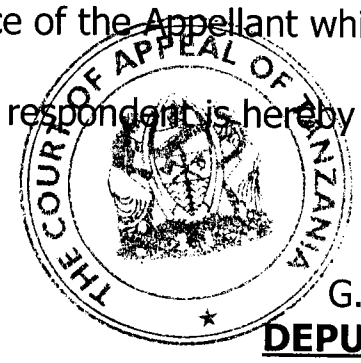
DATED at **DAR ES SALAAM** this 16th day of July, 2020

A. G. MWARIJA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

The Judgment delivered this 24th day of July 2020, in the Absence of the Appellant while duly notified and Deogratius Asenga for the respondent is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL