

**IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY**

AT DAR ES SALAAM

CIVIL CASE No. 144 of 2014

REKHA N. KANABAR.....PLAINTIFF

Versus

MZUMBE UNIVERSITY.....1st DEFENDANT

MAJEMBE AUCTION MART.....2nd DEFENDANT

JUDGMENT

30th April - 5th May 2020

J. A. DE-MELLO J;

The Plaintiff claims against the Defendants jointly for the following orders;

- 1. A Declaration that the Defendant's act of invading the plaintiff premises past midnight looting, destroying and making away with some of the plaintiff's asset was illegal**
- 2. An Order of compensation for the loss and destruction of the Plaintiff properties and other asserts due to the Defendants illegal act worth USD 148,638.00 (United State Dollars One Hundreds Fourty Eight Thousands six hundred Thirty Eight Only).**
- 3. An Order for immediate return of the TShs. 10,800,000/= (Tanzanian Shillings Ten Million Eight Hundred Thousands Only).**
- 4. An Order for General Damages as shall be assessed by Court**

5. Interest in (b) above at Court rate from date of filling this suit to the date of judgment.

6. An Order for Punitive Damages

7. Costs of this suit.

The antiquity of this matter can be discerned from the Plaint and briefly shortened as follows that;

The Plaintiff entered into a **Tenancy Agreement** with **National Housing Corporation (NHC)** for residential premise on the **Apartment No. 001** located at **Plot No. 907** along **Mfaume Street, Upanga Dar Es Salaam**, in **October 2008**. All along, the relationship had been peaceful with each observing own terms and conditions. However, as this was the case, sometimes in the year **2014**, midnight time, the Defendants, through a broker, later to be known as **Yono Auctioneers**, engineered a forceful eviction of the Plaintiff, leading to loss of her assets worth **148,638 USD** and, cash money **Tsh. 10,800,000**, let alone anguish and trauma and, hence this suit. It is an old one having been lodged since with little or know progress at all. On the 7th day of October 2019, it took off with the Plaintiffs summoning two witnesses the two couples and, the tenants, whereas the Defendant had three witnesses. These were, **PW1, Rheka Kanabar** and, the husband **PW2, Sanjay Kanabar**. The defense side had **DW1, Yona Andrew Bujiku** and, **DW2, Stanley Jiraoneka Kavela**.

On record, Parties agreed on the following issues;

1. Whether or not the eviction was lawful?

2. Whether in the cause of eviction exercise the Plaintiff lost property worthy or valued at USD \$ 148,168 cash money the tune of 10,800,000/=

3. To what reliefs are Parties entitled to, if at all?

Alex Mgongolwa learned Advocate appeared for the Plaintiff, assisted by his two junior Counsels, the **1st Defendant** in care of **Benson Hossea** learned **State Attorney**, while the **3rd Defendant** enjoyed the services of **Shadrack**, similarly a learned Advocate.

The following were the exhibits that, parties relied upon to back-up their case;

1. Tenancy Agreement – exhibit P1

2. Photos – exhibit P2

3. Sale Agreement - exhibit D1

4. Engagement for Eviction of Trespasser Plot No. 907 Mfaume Upanga - exhibit D2

It was **PWI's** testimony that, she entered into a lease agreement with the **National Housing Corporation (NHC)** on **24th August, 2009** for term of five years (5) commencing from **1st November, 2008** up to **31st October, 2013**. Further that, and, before the expiry of the said tenure, a vacant possession notice was issued with no further and, better particulars. As this was happening, it later came to the knowledge of the Plaintiff that, the premise had been sold to the **1st Defendant (Mzumbe University)**. In another attempt to plead with the Landlord, she was notified they no longer were in charge of the premise affairs as she was directed to refer all her concerns with the ~~new~~ owner the **1st Defendant**.

Perturbed and, confused, on the **7th June, 2014** at **3.00 a.m.** dawn, they were invaded by a huge group of armed people, forcing entrance and, looting. Un-prepared and, with no notice for eviction, personal belongings to include jewelries and, valuables were forceful drawn from safe box, part of which, gift from friends and, some gifted during her marriage. Other items looted, were a laptop, phones and, cash money amounting **TShs. 10, 800,000/=**. **PW1** tendered the lease agreement as **exhibit P1** which not objected was admitted. On cross examination however, **PW1** admitted to have not contacted the new landlord as advised, based on the fact of the existing agreement with her landlord, which also logically never attracted rentals to them. Second in line was **PW2** the said husband to **PW1**, with nothing rather new, other than corroborating **PW1's** evidence. Different though, was his assertion to witness almost **thirty (30)** people already inside and, afraid, he took refuge back to their bedroom as he attempted a call to his nephew, who in turn reported the invasion to Police who arrived forthwith. On their arrival the looters, the invaders introduced themselves as auctioneers who have been engaged by the **1st Defendant** for eviction. That, if not for the arrival of Police they would have not served a thing as it paved room for diverting the remaining goods from the auctioneers back to their possession. He reiterated while emphasizing that, no notice whatsoever was issued at all but, managed to take photos of the looted, scattered items and, personal belonging at the scene. This was a second exhibit which was objected but ruled out and, marked **exhibit P2** following the **Lease Agreement marked as exhibit P1**.

The defence commenced with **Bujiku** as **DW1**, an employee of **Mzumbe University** as administrator, since **1992**. He appeared to be well versed

with not only his institution but more so the sale, which was executed on **17th October, 2011**, himself acting on behalf of the **1st Defendant** for premise on **Plot No. 907**, situated at **Upanga** area along **Mfaume Street**, from **NHC**. He tendered the same which the Court admitted and, marked **exhibit D1**. He even was aware that, **NHC** duly informed the Plaintiff about the sale while directing them to contact the **1st Defendant** but to no avail. He brought to Court's attention defiance on the part of the Plaintiff as she instituted a Land case against the **NHC** and the **1st Defendant**, which was dismissed on **6th June, 2012**. He prayed for this Court to take Judicial Notice of that Ruling. He even admitted to be the ones who engaged the **2nd Defendant** to evict the defiant Plaintiff considering him being a trespasser based on the truth that, her tenancy expired on **30th October, 2013** but worse even, without any contractual obligation between the two. Rebutting the time of the alleged invasion he asserted it to be at around 10:00 am as opposed to dawn that the Plaintiff has alleged. True, he further admitted and confirmed the Plaintiff's evidence that, the Police arrived at the scene and, took charge of the process, which ended up peacefully as the Plaintiff managed to remove all her belongings. The sale was solely meant for turning the premise as an academic institution and hence in public interest, he pointed out. Reluctance on the part of the Plaintiff horribly delayed the **1st Defendant** plans to effect its cause, he pointed out. Then emerged **DW2, Kevella**, the **Managing Director** of **Yono Auction Mart**, whose evidence revolved on the nature of its mandate and, the instructions given by the **1st Defendant**, solely for evicting the stubborn trespassers, the Plaintiff. He disputed to have invaded the premise at dawn and, loot as alleged but, claiming this is not the modus operandi of doing business within their

company. The exercise he emphasized was professionally and peacefully conducted, more so when Police were around to oversee all. The Plaintiff and, her relatives left the scene very peaceful. When cross examined, **DW2** failed to admit or refuse the scene as observed from the photos admitted as exhibits. Final written submissions was prayed and granted which condoned what the evidence had above.

From the final written submissions, this is what I summarized from **Counsel Mgongolwa** commenced by providing the background of the suit but putting it clear that the sale itself was illegal considering the Tenancy Agreement which was still running. If at all, it is the Plaintiff who ought to enjoy his **first right of refusal**. This Agreement served the year **2009 August**, the **24th** up to **2013 November** the **31st**. In a disrespectful and inhumane manner on the **7th of June, 2014** the Plaintiff were taken by surprise following a midnight invasion by unknown persons, as the locked themselves while observing the breaking into and vandalism looting. Following this and, finding themselves vulnerable, a nephew was called to assist calling the Police who arrived in a very short while. Photos for the vandalism was tendered and admitted marked **exhibit P2**. In actual terms the family was left in awe, anxiety mental anguish and highly traumatized. Addressing the defence evidence, Counsel noted the admission of both **DW1** as well as **DW2** towards eviction and, with no Court order. The two had controverted each other as to the time of eviction between the midnight and, 10:00 hrs when **DW1** arrived at the scene. **DW2** opposed the evidence adduced for **thirty (30)** people but on only three as they found the Plaintiff packing their belongings.

Now and, quite important is the issues that, had been framed and, for response based on the evidence during hearing in which and,

commencing with the first one Counsel points out that, it was so, considering its illegality for missing even a Court order. The Plaintiff being lawful tenants of the **1st Defendant** were neither issued with **Notice of Intention to Terminate the Lease** nor **14 days Notice for eviction**, Counsel states. It is the procedure as provided by **section 104** of the **Land Act Cap.113 RE 2002** together with **Rule 21 (2)** of the **Court Brokers and Process Servers (Appointment, Remuneration and Discipline) Rules** which provides for a lawful eviction. A **thirty days (30) days Notice** was mandatory under **Rule 1** and, **Regulation 21(2)** of the two laws. This did in the ultimate rendered the whole exercise illegal and, may be a reason for that midnight invasion, he thought. With the findings above Counsel answered the **1st** issue in the affirmative. Addressing the **2nd** issue with regard to loss of properties, worth **USD \$ 148,648** and, cash **TShs. 10,800,000/=**, Counsel attributes the breaking into and, to the safe locker, both of which were locked in safe custody. That, in absence of receipts, most of them were gifts received from various Hindu ceremonies. The process and ill exercised even lead some of solid utensils like refrigerators and, TV's mishandled and hence destroyed beyond use. The case of **Express Transport Co. Ltd. vs. BAT Tanzania Ltd (1968)1 EA 443 (CAD) at page 451** and **Revocatus Kidaha vs. National Housing Corporation [1988] page 59** as to the entitlement to market value of the destruction as well as trespass to goods, respectively. Counsel fortifies his prayers for compensation based on the two cases. With regard to Reliefs in which the Plaintiff is entitled to, he avers that, loss and destruction had been proved on balance of probabilities while general damages for **mental anguish, fear, anxiety** leading to depression as a result of that illegal eviction. Conclusively so to

state Counsel and, on the strength of the foregoing submissions prays for costs as well.

Opposing the suit and commencing with the **1st Defendant, State Counsel Benson** by categorically denying the claim both for illegal invitation and, looting intended for eviction. He even brought the Court to the attention of **sections 110 (2) and 111 of Cap. 6**

As to whether or not the eviction was lawful, it is from the testimonies from **DW1** and **DW2** eviction was practical following defiance by the Plaintiff to vacate notwithstanding alleged expiry of her tenancy hence rendering her a trespassers. It was even confirmed by the Plaintiff it being the gist rather essence of this suit and, on **7th June, 2014**. That, the Plaintiff left the premises on her free will is of wanting facts to justify, given the circumstances of the real meaning of the word, eviction. The Police and, not objected by both the Defendants were in control following the Plaintiffs own efforts and not otherwise. It was even on evidence further that, while eviction took effect, **DW1** in his personal capacity did arrive at the scene late at **10:00 am**. What brought him there was nothing else but to oversee and ensure the premise is vacant. Amidst all this background, at no point was the Plaintiff put to notice of the eviction neither by writing nor Court order. All this therefore brings the issue framed to be answered in affirmative, as the act rather conduct contravened **Rule 21 (2) of the Court Broker And Process Server (Appointment, Renumeration And Disiplinary) Rules GN No. 363 of 2017** which provides as follows;

"21(2) the executing officer shall in case of an eviction, serve the Judgment debtor with notice of not less that fourteen working days before eviction".

However, I am also mindful of **section 104 (1)** of the **Land Act Cap. 113 R.E.2002** not applicable as, up to **7th June, 2014**, when the Plaintiff was allegedly no longer a **Tenant. Exhibit P1 the Lease Agreement had long expired since 31st, October, 2013**, consequent thereto the eviction which took place on **7th June 2014**. Being a prior Tenant and dissatisfied with was still in occupancy and which the Defendants was well aware of to deserve her such mistreatment and, illegally as observed having contravened **Rule 21(2) of GN No. 363 of 2017** by the **Court Broker**.

With regard to loss property worth or valued at **USD \$ 148,168** cash well as cash money the tune of **TShs. 10,800,000/=**, it being a specific special claim and, not exhibited by substantiation my discretion is shaken. Apart from the **exhibit P2** which were the inventory accompanied by photos, no any other evidence had been adduced by the Plaintiff to prove cash money in possession and, looted. As rightly captured by the Defendant and which the law demands, "specifically pleaded and strictly proved" the claim remains speculative. I know how difficult this might appear but, the law is very certain on this which demands for proof and in Civil standard that, of **balance of probabilities**. I recall and, it is on record when **PW1** was cross examined by the Counsel for the **2nd Defendant**, that the truck, was loaded some big utensils as the Police at the scene were supervising. In fact, one of the photos had shown a safe from the wall and wide open in the Plaintiff's bedroom which logically would lead to believe it had to be so now that vacancy was desperately

required and by the Defendant assuming it had a key in custody of the Plaintiff to open. Broken or not, it however all boils down to all time principle of law that, one who alleges must prove to the existence of those fact. **Section 110 (1) and (2) of the Law of Evidence Act Cap. 16 R.E.2002** reads as follows, I quote;

"Section 110(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

Section 110(2) reads;

"When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person".

The Plaintiff and, for sure, has failed on that, to even make it for strict proof, it being specific damages. This has been legal position all along as was reiterated in litany of cases, including that of; **Stanbic Bank Tanzania Ltd vs. Abecrombie & Kent (T) Limited, Civil Appeal No. 21 of 2001** (unreported). In **Masolele General Agencies vs. African Inland Church Tanzania [1994] TLR 192** where it was held that;

"Once a claim for a specific item is made that claim must be strictly proved, else there would be no difference between a specific claim and a general one...."

In **Cooper Motors Corporation Ltd. vs. Arusha International Conference Centre [1991] TLR 96 (CA)** and, that of **Zuberi Augustino vs. Anicet Mugabe [1992] TLR 137 CA AT PAGE 139** emphasizing;

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

Being a stranger and hence a Trespasser, to the **1st Defendant**, no any legal obligation was imposed to him for the welfare of Plaintiff and her properties. I subscribe to the case of **William P. Swai vs. Mohamedi Haji & Another, HC Land Appeal No. 164 of 2017**, in which **Wambura J**; observed and, I borrow;

"The appellant could have possibly claimed specific damages only if when the dispute arose, he was a lawful tenant of the respondent. According to the Tribunal's record, at the time when the appellant was evicted from the house, the tenancy agreement between him and the respondents had already come to an end as of 30th June, 2014 and his utensils were removed from the suit premises on 24th October, 2014.

Therefore with the above observations, the second issues is answered in adverse.

The answer to the **3rd issue**, and based on the illegal eviction observed above, the Plaintiff is entitled to **general damages**. I grant so based and guided by a series of decision as to why and what general damages attracts. Damages have been defined in the case of **Livingstone vs. Raywards Coal Company (1850)** to mean;

"That sum of money which put the party who is injured or suffered in the same position as he would have been if he has not sustained any wrong...".

In the case of P. M Jonathan vs. Athumani Khalfani [1980] TLR reiterated as follows;

"The position as it emerges to me, is that damages are compensatory in nature they are intended to take care of the Plaintiff's loss of reputation as well as to act as solarium for mental pain and anguish.

The Blacks Law dictionary defines general damages as follows;

"Damages that the law presumes follow from the type of wrong complained of. General damages do need to specifically claimed or proved to have been sustained".

As already observed and stated, the eviction was not only illegal but embaracing and, quite disturbing. The Plaintiffs were undoubtedly taken by surprise and highly unprepared. I could witness and, read the demenour from both the Plaintiff as well as her husband ,during hearing, still in awe. I even heard them confessing now to be sharing residence with one of their family relatives, which I believe to be undeserving. I therefore and, guided by the principles laid down in the case of **Taylor vs. O'Connor [1975] AC 601**,to award the Plaintiffs **TShs. 20,000,000/=**.

As for Counter claim and, based on the fact that there was no **Landlord/Tenant** relationship between them, the claim is misconceived. The 1st Defendant had all along termed the Plaintiff a Trespasser to justify any Tenancy obligation.

The suit is therefore partly allowed in that vein. Illegally the Plaintiff was evicted, I so hold and, which justifies compensation in terms of general damages only, owing to anguish, trauma and mental suffering for unnotified eviction and at odd hours, to the tune of **TShs. 20,000,000/=**. I arrived at this drawing from the principles set in the

case of **Antony Ngoo vs. Kitinda Kimaro, Civil Appeal No. 25 of 2014** where the **Court stated;**

“The law is settled that general damages are awarded by trial Judge after consideration and deliberation on evidence able to justify the award. The Judge has the discretion in the award of general damages. However, the Judge must assign reasons...”.

I have done so and it is so ordered.


J. A. DE-MELLO

JUDGE

5/5/2020