

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 58 OF 2017

(Arising from the Judgment of District Court of Ilala in Civil Case No. 5 of 2015, date on 1st day of December, 2016 before Hon. Hassan **SRM**)

HASSAN HAULE ABDI 1st APPELLANT

RIMINA AUCTION MART CO. LTD 2nd APPELLANT

VERSUS

HAROUN RASHID SALUM RESPONDENT

JUDGMENT

26th May & 18th June, 2020

E. E. Kakolaki, J

This is a first appeal by the appellants from the decision of the Ilala District Court in Civil Case No. 5 of 2015 the decision which was entered in favour of the respondent. The appeal is contested by the respondent. When the matter came for hearing on 15/04/2020 both parties were represented and prayed for court's leave which was granted to have this appeal disposed by way of written submission. Submissions were filed timely save for rejoinder submission which the appellants seem to have waived to exercise their right. The appellants are represented by Mr. Litete Haji learned advocate whereas the respondent was privileged to have the services of Mr. Abdul Azizi learned advocate.

In their memorandum of appeal the appellants preferred eight grounds of appeal in which after being advised by the court through my sister Muruke J to consolidate them as most of them were looking similar they reduced them into three going as hereunder:

1. That, the Honourable Magistrate grossly erred in law and facts in holding that, the Respondent had proved his case on the balance of probability without adding any documentary evidence to prove ownership of the confiscated goods and/or the land in which the goods were being kept.
2. That, the Honourable Magistrate erred in law and facts in holding that, the respondent was forcefully evicted by the 2nd appellant without court order.
3. That, the Honourable Magistrate erred in law and fact in holding that, the respondent should be paid general damages of the tune of Tshs. 25,000,000/= for inconveniences without proving the case on the balance of probability as to ownership of premises.

It is incumbent to mention at this point that this appeal formerly was presided over by my sisters Muruke J and later on Mutungi J, who were both transferred to other High Court stations before it could be heard and determined, as a result the same was re-assigned to me to proceed with.

The facts that gave rise to this appeal can be briefly stated as follows. The respondent a driver who was also running garage business at a yard situated at Kitunda Matembele within Ilala District, Dar es salaam Region with core activities of repair, Car wash and parking services. On the 31/12/2014 the 2nd appellant acting under instructions of 1st appellant forcefully entered his business premises and had his business properties such as machines, tool box, motor vehicles repair accessories and clients

motor vehicles removed therefrom on allegation that he had unlawfully possessed the 1st appellant's land. Following that act the respondent filed a suit in Ilala District Court, Civil Case No. 5 of 2015 claiming against the appellants jointly and severally for recovery of Tshs. 58,218,000/= as costs for his properties and client's properties entrusted to him allegedly unlawfully taken by the appellants. Further to that he claimed Tshs. 50,000,000/= being general damages, 7% interest at the court's rate from the date of judgment till full and final payment and costs of the suit.

The case was heard on merit and on the 1/12/2016 a judgment was entered in favour of the respondent and a decree awarding him a total sum of Tshs. 58,218,000/= terming it as principal sum of value of the goods taken from his yard and the costs of the case. Further to that the decree awarded him a total sum of Tshs. 25,000,000/= as general damages suffered. To prove his case the respondent presented 4 witnesses and tendered in court Exh. P1 a paper containing list of items alleged to be removed and taken by the appellants from his yard such as spare parts, machines and other accessories all totalled at Tshs. 58,218,00/=. In opposition the appellants paraded only two witnesses and tendered Exh. D1 a Residence Licence to disprove respondent's claims. In arriving to that decision the trial court considered and determined the three issues framed by the court prior to hearing of the case. These are:

- (1) Whether the plaintiff is a real owner of the goods taken from that particular yard.
- (2) Whether the act of the taking those goods by the 2nd defendant under the instructions of the 1st defendant was lawful.
- (3) What reliefs the parties are entitled.

The appellants being discontented are now before this court canvassed with three grounds of appeal as narrated herein before.

Submitting on the first ground of appeal as consolidated Haji for the appellants claimed that, the Honourable Magistrate grossly erred in law and facts in holding that, the Respondent had proved his case on the balance of probability without adding any documentary evidence to prove ownership of the confiscated goods and/or the land in which the goods were being kept. He argued this ground on three limbs. The first limb is that there was no evidence led by the respondent to prove ownership or to have entrusted to the properties listed in Exh. P1 alleged to have been taken by the appellants. On the second limb Mr. Haji submitted that the listed items were not legally in the alleged business premises as the appellants tendered residence licence Exh. D1 to prove that the business premise belonged to the 1st appellant and therefore respondent and his items were illegally in that premises. And the third limb was that the claim of Tshs. 58,218,000/= as specific damages must be pleaded and proved specifically as it was held in the case of **Stanbic Bank Tanzania Limited Versus Abercrombie & Kent (T) Limited**, Civil Appeal No. 21 of 2001 (CAT-unreported). He argued that in this case the awarded figure just came from the sky without any justification or in other words that it was not substantiated as to how that figure was arrived at as the respondent completely failed to account on the value of the listed items either by valuation report or receipts.

Responding to the first limb of this ground of appeal Mr. Aziz for the respondent on the issue of ownership of the items listed, stated that the respondent being in possession of the said goods some of which were entrusted to him is a prove that he owned them. On the other properties

which were for sale as shown in Exh. P1 and cash money were all taken by the appellants as proved by Pw4 which included the register book for parking vehicles. On second limb on ownership of the business premises Mr. Aziz contended the same belong to the respondent as there was no case filed by the 1st appellant against the respondent to challenge the said ownership or prove otherwise. On the third limb of the respondent's failure to prove specific damages by accounting on the value of the items listed in Exh. P1 hence the trial court arriving wrongly to its decision the respondent had nothing to respond to.

With regard to non-proof of possession of the listed items in Exh. P1 by the respondent allegedly taken by the appellants, I agree with Mr. Haji's contention that the same was not proved. I disagree with Mr. Aziz's assertion that the said goods and its ownership documents were all taken by the appellants. There is no evidence proving that assertion. Pw1 stated in his evidence that he reported at police of the invasion and varnishing of his goods/properties after forceful and unlawful eviction by the appellants. However, no lost report or reported book number (RB) from police was tendered in court to prove that ownership documents of goods were amongst the reported missing documents nor were they registered in Exh. P1 to be amongst the items taken by the appellants. I am therefore of the findings that this limb of first ground has merit.

On the second limb of proof of ownership of the business premises I am at hand with Mr. Aziz that, that issue ought to have been challenged by the appellants who claimed otherwise by filing a case in the appropriate forum. The issue of ownership in my considered view could not be determined by either the trial court or this court. Thus there is no valid point on this argument.

On the last limb to the first ground on failure of respondent to prove specific damages by account on the value of the listed items either by valuation report or receipts, I am of the view that specific damages must be proved specifically and strictly. This was the position in the case of Stanbic Bank Tanzania Limited (supra) when the Court of Appeal stated:

*"... The law is that special damages must be proved specifically and strictly. Lord Macnaughten in **Balog Vs. Hutchison** (1950) AC 512 at 525 – 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 specifically and proved strictly."

The Court went on to quote its decision in the case of **Zuberi Augustino V. Anicet Mugabe** (1992) TLR 137, at page 139 that:-

*"It is trite law and we need not cite any authority that **special damages must be specifically pleaded and proved.**"*
(emphasis supplied).

Now applying that principle in this matter the issue is whether Tshs. 58,218,000/= was specifically pleaded and proved. What is discerned in paragraph 4 of the plaint is that the said claims were made but no particulars were given. Further to that there is no testimony nor documentary exhibit tendered in court to prove the value of the alleged listed items in Exh. P1. Neither Pw1 nor Pw4 attempted to give account on how the value of Tshs. 58,218,000/= was arrived at apart from Pw4 stating at page 28 to 29 of the proceedings that he listed those goods and

all totalled Tshs. 58,218,000/= without providing value of each item or issue a receipt. I am therefore at fours with Mr. Haji that the same was not proved. It follows therefore that this ground has merit.

On the second ground Mr. Haji contended that, the Honourable Magistrate erred in law and facts in holding that, the Respondent was forcefully and unlawfully evicted by the 2nd respondent without court order. It was his submission on this ground that the respondent had invaded the 1st appellant's land and carried illegal business therein thus interfering with the 1st appellant's right of protection of property enshrined in the Constitution of the United Republic of Tanzania, 1977 since he had a valid residence licence Exh. D1. So the court was not justified to hold that it was unlawful for the appellant (defendant) to take goods from the yard of PW1 (the Respondent) without any order authorising them. Responding to Mr. Haji's submission, Mr. Aziz for the respondent was very brief that the trial magistrate was correct to hold so because Dw1 in his defence evidence proved that the eviction exercise was performed without any court order as they received instruction from Dw2 who tendered no court order directing him to evict the respondent. I think this point need not detain me much. It is not in dispute that the appellants failed to tender any eviction order from the competent court to justify their exercise of evicting the respondent as rightly submitted by Mr. Aziz. I therefore hold that this ground has no merit and I dismiss it.

On the last ground it was Mr. Haji's lamentation that, the Honourable erred in law and fact in holding that, the respondent should be paid general damages of the tune of Tshs. 25,000,000/= for inconveniences without proving the case on the balance of probability as to ownership of premises. He submitted that the award of Tshs. 25,000,000/= to the

respondent as general damages for inconveniences suffered by the respondent was wrong. That in absence of any proof of the claims in the plaint as elaborated in the foregoing ground, what was being claimed by the respondent was not in the parameter of damages arising from either contractual dealing or tortious liability as the Respondent did not state it in the paragraph of his claims. He therefore prayed the court to find the ground meritorious and allow the entire appeal generally.

In his response Mr. Aziz stated that this ground is baseless as the trial magistrate in his judgment stated that the case was proved on the balance of probability and that as the respondent was restrained from proceeding with his activities then the appellants (defendants) had to pay the respondent Tshs. 25,000,000/= as general damages. So the trial magistrate was justified to arrive at that conclusion he submitted and prayed the court to dismiss this ground and the entire appeal with costs. I think there is a point in Mr. Haji's point. Firstly, is that the respondent in the claim paragraph of the plaint failed to state the amount of general damages are claimed from what kind of cause of action. Secondly, the factor used by the trial court in arriving at the figure of Tshs. 25,000,000/= which is the appellant's act of causing inconvenience to the respondent by restraining him from proceeding with his activities was neither pleaded nor adduced in evidence when the respondent or his witnesses were testifying in court. It was held in the case of **Stanbic Bank Tanzania Limited** (supra) when citing with approval the case of **Balog** (supra) that, general damages are:

*...such as the law will presume to be the direct, natural or probable **consequence of the action complained of.***

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 Blackburn in **Livingstone V. Rawyards Coal Co** (1950) 5 App. Cas 25 at page 39.*

*Asquith, CJ. 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 rights had been observed."*

Guided by the above definition and principle in order for the party to be awarded general damages there must be direct, natural or probable cause of action complained of. In this case since the respondent failed to state in the plaint as well as when giving testimony from which cause of action is his claims of general damages based as stated earlier herein above, I hold that the trial magistrate was not justified to award respondent the said Tshs. 25,000,000/= as general damages as rightly submitted by Mr. Haji. This ground of appeal has merit too.

That said, and for the foregoing reasons, I hold that this appeal has merit and is hereby allowed on the first and third grounds of appeal. The judgment of the trial court and the decree thereof are set aside. Costs of the appeal to be taxed.

It is so ordered.

DATED at DAR ES SALAAM this 18th day of June, 2020.



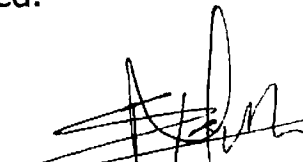
E. E. KAKOLAKI

JUDGE

18/06/2020

Delivered at Dar es Salaam today on 18/05/2020 in the presence of MR. ABDUL AZIZ learned Advocate for the Respondent who is also holding brief for MR. HAJI LUTETE learned Advocate for the Appellants and in the presence of **Ms. Lulu Msasi** Court clerk.

Right of appeal explained.



E. E. Kakolaki

JUDGE

18/06/2020