

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE SUB- REGISTRY OF DAR ES SALAAM**

**AT DAR ES SALAAM**

**CIVIL CASE NO. 187 OF 2021**

**GLORIA KYONJOLA KIGWILA ..... 1<sup>ST</sup> PLAINTIFF**

**NATHANIEL MWAKIPITI KIGWILA ..... 2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**MAGRETH ANDULILE BUKUKU ..... DEFENDANT**

**JUDGMENT**

**ISMAIL, J.**

31<sup>st</sup> August, & 1<sup>st</sup> November, 2021

The plaintiffs in this case are a couple that is resident at Salasala, within the City of Dar es Salaam. Their adversary is a person who is alleged to have illegally entered into the plaintiff's residence, forcibly evicted them and moved out their assets, ostensibly to gain access of the house that the defendant alleged was hers.

Going by the statement of claim (plaint), the house in question is built on Plot Nos. 256/1, 257/1 and 258 Block E, Salasala Area, Kunduchi, Kinondoni Municipality in Dare es Salaam. It allegedly kept assorted household items, machinery, equipment and other personal items. The

house was embroiled in a legal tussle that culminated in the institution of a suit (Civil Case No. 40 of 2018) in respect of which the defendant was allegedly adjudged the lawful owner. This was vide an *ex-parte* decision which was delivered on 26<sup>th</sup> May, 2020. The contention by the defendant in the said case was that she bought the said house in a public auction.

Subsequent to the delivery of the decision, the defendant allegedly filed execution proceedings, vide Execution No. 70 of 2020, which were countered by filing objection proceedings, registered as Misc. Land Application No. 135 of 2021. The allegation by the plaintiffs is that, whilst the objection proceedings were still pending, the defendant hired people who violently and menacingly entered into the suit premises, threw whatever that was in the house, and drove out the plaintiffs and their family members. The plaintiffs were then restrained from setting their feet into the premises, a restraint that lasted between 15<sup>th</sup> April and 18<sup>th</sup> August, 2021, when they were reinstated back to the suit premises. The plaintiffs' further averment is that this forcible eviction from the suit premises inflicted a serious damage and destruction onto their properties, their reputation, and caused financial loss. The alleged losses have bred the following prayers against the defendant:

- (a) Payment of TZS. 338,150,000/-, being special damages for loss and damage to the plaintiffs' properties;
- (b) Payment of TZS. 200,000,000/- being punitive and exemplary damages;
- (c) Payment of TZS. 71,800,000/- being general damages;
- (d) Interest at court rates on the decretal sum at 7% from the date of judgment till full satisfaction of the decretal sum;
- (e) Costs of this suit;
- (f) Any other relief(s) as this Honourable may deem just and proper to grant.

The defendant was served with the plaint but chose to spurn the chance to make a rebuttal of the allegations levelled against her. Based on the proof of service and, relying on the provisions of Order VIII rule 14 (1) of the Civil Procedure Code, Cap. 33 R.E. 2019 (CPC), an order was issued to the effect that hearing of the matter should proceed *ex-parte*.

At the beginning of the trial, and in view of the fact that the defendant made no defence, the Court ordered that the trial proceedings should be handled consistent with the provisions of Order XIV rule 1 (6) of the CPC. For ease of reference, the said provision states as hereunder:

*"Nothing in this rule requires the court to frame and record issues where the defendant at the first hearing of the suit makes no defence."*

The trial proceedings saw the plaintiffs marshal the attendance of three witnesses who testified in support of the plaintiffs' case. They, in the process, tendered five documentary exhibits. Documents tendered are:

- (i) A copy of the an application for objection proceedings (Exhibit P1);
- (ii) A court order dated 12<sup>th</sup> April, 2021 (Exhibit P2);
- (iii) A court order dated 10<sup>th</sup> June, 2021 (Exhibit P3);
- (iv) An EFD receipt for payment of the broker fees (Exhibit P4);  
and
- (v) Valuation report of the plaintiffs' movable assets (Exhibit P5).

In his testimony, Bishop Nathaniel Mwakapiti Kigwila featured as PW1. He described himself as the 1<sup>st</sup> defendant's husband and gave an account of what happened on 15<sup>th</sup> April, 2021, the day on which the defendant came, armed with an eviction order. He testified that the defendant was aided by bouncers and emptied the house before the plaintiffs were ordered out of the house. The witness further testified that the defendant and her 'entourage', broke the perimeter fence, and that items and equipment that

were moved out were subjected to harsh weather conditions for four months, thereby completely destroying them to the extent of rendering them valueless. PW1 contended that, up until the time of forcible removal from the house, no notice of any court proceedings was served on the plaintiffs, though he had already instructed his counsel to take steps and defend proceedings which were in court. The items destroyed were sofa sets, generators, assorted machines, hospital equipment, caterpillar, bedding materials and assorted clothing materials.

The witness further stated that the defendant's acts affected him psychologically for lacking proper housing, and subjected him to embarrassment, public ridicule and contempt. He urged the Court to order compensation for the costs incurred in re-building the perimeter fence, loss of properties for the damage caused and interest on the claims.

PW2 was Gloria Kionjola Kigwila, who stated more or less the same set of facts regarding the 'invasion', allegedly perpetrated by the defendants, and the claim for alleged loss. PW2 denied any awareness of the sale of the house to the defendant or at all. The witness contended that the case against the defendant had been stayed to await ruling that would be delivered on 10<sup>th</sup> June, 2021, the date on which the plaintiffs were reinstated back to the

house. On this, she tendered Exhibit P2, and Exhibit P3, the latter of which was a reinstatement order.

PW2 further stated that the plaintiffs engaged a valuer who carried out valuation of the properties alleged to have been damaged and that the plaintiffs paid TZS. 2,000,000/-, while a further sum of TZS. 6,000,000/- was paid to a broker who helped them move in. On this, the said witness tendered Exhibit P4. Overall, PW2 prayed for compensation in the sum of TZS. 356,000,000/-; general damages and costs of the matter.

PW3 was Ramadhan Swaleh, a Valuer from Go Property, Consultants & Auctioneers Limited. He testified on how he was assigned to carry out an evaluation of the assets of Gloria Kigwila, and that the assignment took him to the plaintiff's residence and assessed the assets that were allegedly thrown out. He stated that the assessment began with physical viewing, identification of the assets, their use and their condition at the time of inspection. It was his testimony that the assets had significantly depreciated, decayed and lost value. They were beyond repair, he testified. He stated further that the reason was that they were subjected to sun and rain, while others were destroyed during the eviction. He compared the prices and concluded that their market value at the time was TZS. 33,900,000/- while

new acquisition would cost TZS. 200,094,300/-. PW3 tendered a Valuation Report which was admitted as Exhibit P5.

At the conclusion of the trial proceedings, the plaintiff's counsel prayed to submit a final submission which was filed timely. The final submission recapped what was testified by the trio of the plaintiffs' witnesses. Besides building a case for payment of specific damages alleged to be to the tune of TZS. 338,150,000/-, there is also a claim of general damages to the tune of TZS. 200,000,000/-.

With regards to special damages, the plaintiffs' counsel restated the principle accentuated in the case of ***Zuberi Augustino v. Anicet Mugabe*** [1992] TLR 137, in which it was stated that the trite law is that special damages must be specifically pleaded and proved. Regarding the costs, the plaintiffs argued that they are entitled to a recompense, since they instructed four counsel to represent them in the case.

I will begin the analysis of the matter by stating that, from the available facts as deduced from the testimony adduced by PW1 and PW2, there can hardly be any argument that eviction of the plaintiffs, done at the behest of the defendant, was subsequently reversed by the Court, pursuant to an order of the Court dated 10<sup>th</sup> of June, 2021. This came while the defendant was aware of the pending objection proceedings which were intended to

challenge the decision passed in the defendant's favour. It occurred at a time when the application had been set for orders on 10<sup>th</sup> June, 2021. While it is not evident that a stay order was sought and granted, the defendant ought to have known or she knew that the decision she sought to implement was a subject of contention in court. The available testimony is to the effect that the defendant and her advocates were in court on 12<sup>th</sup> April, 2021, the date on which the matter was set for orders.

It is plausible to conclude that the defendant's actions were uncalled for and a clear violation of the law. These actions were responsible for the damage that was inflicted on the plaintiffs.

Next is the question of damages payable to the plaintiffs. The plaintiffs have clustered their claims of damages into three *viz.*, specific damages; general damages; and punitive and exemplary damages.

Before I delve into the details of each and every head of damages, I feel obliged to lay a general foundation on what the damages are and the criteria for their award. Halsbury's Laws of England 3<sup>rd</sup> Edition Volume 11 page 216, defines damages to mean:

*"Damages may be defined as the pecuniary compensation which the law awards to a person for the injury he has sustained by reason of the act or default of another, whether that act or default is a breach of contract or a tort*



*or to put more shortly damages are the compensation given by process of law to a person for the wrong that another has done to him."*

The foregoing definition has found a perfect match in the reasoning of Lord Blackburn who held in ***Livingstone v. Rawyards Cool Co.*** (1880) 5 App. Cas. 25, as hereunder—

*"... 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 in if he had not sustained the wrong for which he is now getting his compensation or reparation."*

As stated earlier on, part of the plaintiffs' claims are those of punitive and exemplary damages. These are pleaded in paragraph 19 of the plaint, and they touch upon what is considered to arise from the defendant's unlawful act of carrying out an eviction that has since been annulled.

As I address this issue, it behooves me to define what amounts to punitive or exemplary damages. In law, punitive damages are a legal recompense that a defendant found guilty of committing a wrong or offence is ordered to pay on top of compensatory damages. They are awarded by a court of law not to compensate injured plaintiffs but to punish defendants

whose conduct is considered grossly negligent or intentional. These are often referred to as exemplary damages (See: <https://www.investopedia.com>).

The foregoing definition got a fitting illustration from the Court's decision in the case of ***P.M. Jonathan v. Athuman Khalfan*** [1980] TLR 175, in which Lugakingira, J., (as he then was) held as follows:

*"..... Exemplary damages, on the other hand, are a punishment to the defendant for misconduct which general and aggravated damages cannot reach and as a reminder that tort does not pay. They should be recoverable from any defendant whose outrage deserves punishment. It may be anomalous to use the civil court for criminal purposes but I do not desire to express myself on the issue. I would only add that where the defendant is a servant of the people and commits wrong under the guise of his power or where the defendant is motivated by expectations of gain that would be reason for the court to take an even more serious view and to award such exemplary damages as the occasion would require."*

The plaintiffs have not placed before the Court, any semblance of factual account that would constitute the basis for the award of punitive or exemplary damages sought in item (b) of the reliefs sought in the matter. While it is agreed that the defendant's action was a step out of the ordinary,

it cannot be said that such conduct was so outrageous as to demand that it be punished by way of exemplary damages. What are considered to be the sufferings endured by the plaintiffs are consequential effects which would be addressed through general and specific damages, both of which are part of the prayers made by the plaintiffs. Since the prayer for these damages is predicated on a shaky foundation, I am unable to accede to such demand. Consequently, I reject it out of hand.

The plaintiffs have also laid their stake in the award of special damages. These constitute a big chunk of the claims and, by and large, they constitute the value of damaged properties; costs incurred in the preparation of the valuation report; costs of relocation; and costs of repair of part of the perimeter fence which was allegedly destroyed by the defendant.

As stated in the submission, the underlying principle in the award of special damages is that such damages must be specifically pleaded and specifically proved. The case of ***Zuberi Augustino v. Anicet Mugabe*** (supra), and a multitude of others serve to fortify this imperative requirement. I have scrupulously reviewed the claims that form the constituent parts of the specific damages prayed by the plaintiffs. A number of issues arise therefrom. These issues raise a question or two about the validity of some of the claims. These issues are:

- (i) Exhibit P5 is silent on the source of the alleged destruction of the properties, and whether the alleged destruction occurred during the two-month long relocation from the house;
- (ii) Exhibit P5 did not say that the market value prior to the alleged destruction was/would be higher than what it was after the destruction, and by what margin;
- (iii) There is no evidence that prior to destruction, all of the listed items were in good running conditions;
- (iv) No evidence has been led to establish the value immediately before the destruction, considering that the damaged items were in use, and that wear and tear, besides other forms of depreciation, were bound to occur;
- (v) The claim is based on the valuation and assumption that these items were all new from the source, yet there is no evidence that they were bought as new items from the market. No receipts were tendered to evidence payment of the sum claimed. Time difference could have a bearing on the purchase price at the time of acquisition;
- (vi) Whereas the pleaded amount for specific damages is TZS. 338,150,000/-, the sum testified on and prayed by PW2 is

TZS. 356,000,000/-. No explanation has been offered with regards to the variance and it is not clear which of the two is to rely on;

- (vii) The sum of TZS. 3,000,000/- claimed under paragraph 18 (b) is not evidenced. The testimony (PW2) was to the effect that the plaintiffs paid TZS. 2,000,000/- and not TZS. 3,000,000, pleaded in paragraph 18 (b);
- (viii) The sum of TZS. 6,600,000/- was paid on 20<sup>th</sup> September, 2021, in excess of three months from the reinstatement order. PW1 said that they moved back to the house two months after the reinstatement order. There is no explanation on why payment of the sum was made more than a month later. It is not clear if this payment was in respect of the services of moving back and the said payee was not paraded as a witness. We are not sure if the court broker pleaded in paragraph 18 (c) is the same person. There are no specifics of what this hefty sum catered for.

From the foregoing, my conviction is that some of the claims levelled by the plaintiffs lack the basis that would come with adduction of evidence that would specifically prove that such losses were incurred. This affects the

claim of TZS. 3,000,000/-, and the whole of what is considered to be special damages, amounting to TZS. 338,150,000/- which is at variance with the testimony adduced by PW2 and Exhibit P5. I would spare the sum TZS. 6,600,000/- which, though its basis is less clear, it is sufficiently evidenced through Exhibit P4.

It is to be noted that the decision to chalk off these claims is based on the consequence of non-adherence to this requirement of having specific damages specifically pleaded and specifically proved. These consequences have been judicially underscored in many a decision. Thus, in ***Director Moshi Municipal Council v. Stalenard Mnest & Another***, CAT-Civil Appeal No. 246 of 2017, the Court of Appeal of Tanzania stated that "*Once such claim is neither pleaded specifically nor strictly proven, it fails.*" The upper Bench went further and held as follows:

*"There would be no point of requiring such a claim to be specifically pleaded and strictly proven if, upon failure to establish it, the claimant would still be awarded a reduced quantum of special damages as was the case in the instant appeal. The trial tribunal had no discretion to do so."*

There is also a claim for general damages, constituting TZS. 100,000,000/- as pleaded in paragraph 20 of the plaint, and TZS. 71,800,000/- prayed in item (c) of the reliefs. Again, this variance has neither

been explained nor has it been harmonized by any of the witnesses. Not even in the plaintiffs' final submission. I will revert to this issue in a moment.

Regarding general damages, the settled position on what role they play was propounded by Asquith, L.J., who held in ***Victoria Laundry v. Newman*** [1949] 2 KB 528 at page 539, that the purpose of damages is to put the plaintiff *"... in the same position, so far as money can do so, as if his rights had been observed."*

This position mirrors what the Court of Appeal of Tanzania held in ***Hotel Travertine Limited v. M/S Gailey & Roberts Limited*** [2009] TLR 158, as it quoted a passage in ***Johnson and Another v. Agnew*** [1980] AC 367, in which Lord Wilberforce held:

*"The general principle for the assessment of damages is compensatory i.e. the innocent party is to be placed so far as money can do so, in the same position as if the contract had been performed. Where the contract is one of sale, this principle normally leads to assessment of damages as at the date of breach ...."*

Besides this, the other known fact is that assessment of damages is the exclusive domain of a trial court which would only be interfered with if the assessment is based on fundamental improprieties which would render

the assessment a parody (See: ***Razia Jaffer Ali v. Ahmed Mohamedali Sewji***, CAT-Civil Appeal No. 63 of 2005 (unreported)).

The condition precedent, however, is that reasons for settling on a certain quantum must be assigned. This was emphasized in ***Anthony Ngoo & Another v. Kitinda Kimaro***, CAT-Civil Appeal No. 25 of 2014 (unreported).

It was held as follows:

*"The law is settled that general damages are awarded by the trial judge after consideration and deliberation on the evidence on record able to justify the award. The judge has discretion in the award of general damages. However, the judge must assign a reason ...."*

Having carefully reviewed the sequence of events in this matter, there can hardly be any argument that the plaintiffs were subjected to horrible conditions, and that what they went through was an undeserved ordeal which was needlessly perpetrated by the defendant. It lowered the plaintiffs' dignity and left some scars which will stick for some time. Given their status as ministers of religion, the dent caused by this act has percolated far beyond their normal personal positions. It touched on the institution they lead and the congregants they shepherd. This perfectly entitles the plaintiffs to some recompense and, given the magnitude of the damage caused, I take the view that the sum of TZS. 100,000,000/- sufficiently places the plaintiffs so



far as money can do and as if their rights had been observed. The preference of this quantum to that prayed in the reliefs takes into account the fact that damages are determined by the Court and the circumstances of the case demand that the plaintiffs be awarded a higher amount than that.

I take the view and hold that this suit partly succeeds in the manner shown hereinabove. For avoidance of doubt and ease of understanding, the following reliefs are ordered:

- (i) Payment of TZS. 6,600,000/- being a refund for fees paid to the court broker for reinstatement back to the house;
- (ii) Payment of TZS. 100,000,0000/- being general damages for the damage suffered by the plaintiffs;
- (iii) Interest on the aggregate sum of items (i) and (ii), at the rate of 7% from the date of judgment to the date of full satisfaction of the decretal sum; and
- (iv) Costs of the matter.

It is ordered accordingly.

DATED at **DAR ES SALAAM** this 1<sup>st</sup> day of November, 2022.



**M.K. ISMAIL**

**JUDGE**

**01/11/2022**

