

**IN THE HIGH COURT OF TANZANIA**

**IN THE DISTRICT REGISTRY**

**AT MWANZA**

**LAND CASE NO. 01 OF 2016**

**SAMWEL NOEL KIMARO ..... PLAINTIFF**

**VERSUS**

**HUSSEIN YUSUPH UGULUM ..... 1<sup>ST</sup> DEFENDANT**

**S. L. ISANGI AUCTION MART AND  
COURT BROKERS ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**10<sup>th</sup> Nov. 2020 & 26<sup>th</sup> Jan. 2021**

**RUMANYIKA, J.:**

On 11/01/2016, according to records say half a decade ago Samwel Noel kimaro (the plaintiff) sued S.L I sangi Auction Mart and Court Brokers (the 1<sup>st</sup> and 2<sup>nd</sup> defendants) respectively for payment of; **(i)** with effect from 07/08/2013 to the date of judgment per day shs. 440,000/= being compensation for loss of business due to the purported breach of tenancy agreement therefore improper and wrong eviction from the disputed commercial premises **(ii)** shs. 200.0 million being value of the merchandise loss caused during the eviction **(iii)** shs. 30.0 million being the loss of profit **(iv)** shs. 500.0 million being general damages **(v)** an order of vacant possession against the 1<sup>st</sup> defendant, interest and costs.

It is at this juncture also worth noted that having had settled it amicably, according to records the 1<sup>st</sup> defendant was, with effect from 23/12/2019 discharged unless the context otherwise required, the 1<sup>st</sup> defendant will not, in this judgment feature any more. For some reasons inclusive of transfer of judges and clearance of backlog strategy the case having had changed the hands.

Messrs Andrew Luhigo, Mubezi and Kassim Gilla learned counsel they appeared for the plaintiff and defendants respectively.

Pw1 Marco Kibiti Mniko, a driver stated that he knew his co-tenant plaintiff who traded on furniture and had one Rehema as shop assistant that as the latter was also around on 07/08/2013, he witnessed the plaintiff's shop surrounded by a crowd of people, broken into and some items carried away by truck of the plaintiff's wife Reg. No. T.433 AZC make Mitsubishi Fuso.

Pw2 Samwel Noel Kimaro stated that with effect from 08/07/2009 he had been the 1<sup>st</sup> defendant's tenant among others with condition that he renovates the house from residential to commercial purposes as per copy of deed of assignment- "PE2" for Plot Nos. 102 and 103 Block "O" Kenyatta



Road Mwanza (copy of the Lease Agreement-Exhibit "PE1". He therefore renovated it for shs. 6.0 million (receipts-"PE4") copy of receipt for fee of shs. 64,000/= for that purposes paid to the local authorities by the plaintiff for the renovation/ building permit-"PE3". Copy(s) of the plaintiff's general business licence and a certificate of registration- "PE5" and "PE6" respectively.

Pw3 Masalu Madirisha Langula (44) a bicycle repairer stated that as he was at the time busy around the suit premises, his neighbour the plaintiff who ran a furniture and hardware shop around he had the commercial premises forcibly broken into by people and the items swept away then they replaced the padlocks but all this also happened in presence of the plaintiff's assistant then it was calm but the house remained closed until sometimes later when some others took over.

Dw1 Silas Lucas Isangi (53) stated that with respect to the alleged execution and therefore the case, as court broker, against the plaintiff he, in ordinary course of business simply complied with the order dated 05/08/2013 of the executing Mwanza District Land and Housing Tribunal (copy of the order Exhibit "P7" duly identified) that upon consultation with one Hamidu S. Saidi the local chair on 07/08/2013, by way of forcible/

summary eviction they broke into the house and removed the items much as the absentee plaintiff he had a notice and Chacha Makele and Coletha Samwel who introduced themselves as the plaintiff's relatives they were invited, so were the 1<sup>st</sup> defendant and others inclusive of the plaintiff's wife for the purposes then left the place at 16.00 hours but the three (3) remained back with all the items intact, the exercise was successful and the local chair certified it as such on 07/08/2013 (copy of the report – Exhibit "D1") much as although the relatives refused to sign it, basically it was an undeniable fact that following the DLHT's forcible/summary eviction order, at least some shop items were removed by the executing courts officer (Dw1) therefore following the objection this is the reason I reserved during hearing on 10/11/2020.

Dw2 Hamidu Suleiman Said (52) formerly the local Pamba "A" and Milongo Ward Councillor he stated that also invited for the purposes, he witnessed eviction of the plaintiff at about afternoon of 07/08/2013 whereby also, one Coletha, Chacha and the plaintiff's wife witnessed it and end of the day they took the items with them in three trips of Toyota Mitsubish Canter Reg. No. T433 AZC (Exh. "D1" duly identified).



Dw3 Lyasuka Swalehe Ibrahim (45) stated that during execution of the DLHT's forcible execution order he worked with the 2<sup>nd</sup> defendant and, in the presence of the Local leader they handed over all the items (no furniture at all) to the plaintiff's relatives inclusive of a shop assistant thereof. That is all.

As it was from the outset proposed by the parties and the court adopted them, mainly the issue is whether the 2<sup>nd</sup> defendant is liable for any loss occasioned during the forcible execution order of the DLHT. The answer is only for one main reason no; Not only as it was rightly pleaded by him in paragraphs 15, 16, 17 and 18 of the plaint, but also the plaintiff did not sufficiently disprove the fact that whether or not the DLHT order for summary eviction it was improperly issued, the dully assigned executing officer that is the 2<sup>nd</sup> defendant had no reason at all not to comply. In other words one being the necessary or proper party, the 2<sup>nd</sup> defendant was wrongly sued more so where the executing Tribunal and the Attorney General for that matter were not even impleaded.

Having broken into, the defendants may or may have not taken the shop items with them yes, but for the reasons known to himself the moment the plaintiff he failed to bring his wife in court or any one of the

said relatives Coletha Samwel or Chacha Makele also reported to have witnessed the execution and that end of the day they drove away the shop items with them, it cannot, on balance of probabilities be said that the plaintiff has proved his case against the remaining 2<sup>nd</sup> defendant. Suffice the above stated two points to dispose of the case.

Without prejudice to the foregoing discussion however, against the DLHT judgment and decree the plaintiff may have had a pending appeal herein the court yes, but the moment it was, at a later stage disposed in the plaintiff's favour, with greatest respect all was long ago overtaken by events much as there had been no any court order staying the execution. It is now settled principle of law that any attempt to stay execution of a decree which is already executed it saves nothing but mere academic purposes (see the case of **Mafuru Magwega V Maregesi Manema**, MZA Civil Application No.6 of 2005 (CA) - unreported. It is therefore the dictates both of wisdom and analogy that no court shall grant injunction to restrain a mortgagee from exercising its statutory powers of attachment and sale of the property at issue solely on the ground that there was a dispute as to the amount due under mortgage (case of **Pelican Investment LTD v. National Bank of Kenya Ltd** (2002) 2 EA 488. In other words as far as

the impugned forcible eviction order was concerned whether or not the plaintiff had breached terms of the lease agreement it was immaterial in my considered opinion. As said, the plaintiff having had pleaded that as a tenant the LHT had held him liable and his application for stay of execution pending appeal was unsuccessful. The moment the DLHT declared the tenancy agreement having been breached by the plaintiff, and there was, in his favour no stay of execution ordered by any competent tribunal, the plaintiff volunteered all the consequences of the forcible and summary eviction.

The devoid of merits suit is dismissed entirely with costs. It is so ordered.

  
**S. M. RUMANYIKA**  
**JUDGE**

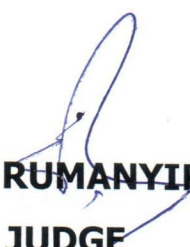
**20/01/2021**

The judgment is delivered under my hand and seal of the court in chambers this 26/01/2021 in the presence of Mr. Linus learned counsel



only for the plaintiff (also holding briefs of Mr. Kassim Gilla learned counsel  
for the 1<sup>st</sup> defendant.



  
**S. M. RUMANYIKA**  
**JUDGE**  
**26/01/2021**