

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM
CIVIL CASE NO. 149 OF 2013**

FELIX HENRY KILEWO PLAINTIFF

VERSUS

TIB DEVELOPMENT BANK LTD.....1ST DEFENDANT

SYLVESTER SHAYO T/A

SYLVESTER SHAYO & CO. ADVOCATES.....2ND DEFENDANT

RHINO AUCTION MART AND COURT BROKERS.....3RD DEFENDANT

RASILIMALI LIMITED.....4TH DEFENDANT

JUDGMENT

Last Order: 27/5/2022

Date of Judgment: 24/6/2022

MASABO, J.:-

The plaintiff herein is challenging his eviction from house No.15 situated in Plot No. 223/50 Ohio Street, Ilala Municipality in Dar es Salaam City (the suit premise). His major grievance is that on 15/1/2013 the 1st to 3rd defendant unlawfully evicted him and demolished the suit premise which he lawfully occupied for 34 years as a service tenant and had prospects for joint development of the same under Public Private Partnership (PPP).

He has pleaded further that the eviction which was forcefully carried out at around 4:00 am has caused him and his family unbearable loss. A substantial part of his valuable assets was taken away and others were destroyed while he remained helpless and unable to rescue anything as he was in great shock. His cash to a tune of USD 17,000.00 disappeared. His official certificates, flying licenses and logbooks, motor vehicle registration cards and other personal and official documents were lost. Motor vehicles and spare parts imported for sale from Dubai and Japan, assembled building materials, canteen holds, a hydraform bricks making machine and many other assets owned by him and his family members all vanished. In quantum, the total loss claimed amount to Tshs 15,523,961,738.40 being special damages particularized under paragraphs 18 to 30 of the plaint. His further claims are for USD 17,000.00 being cash lost in the course of eviction and Tshs 2,000,000,000/= as general damages for shock, depression, psychological torture, humiliation and disrepute which he and his family suffered as a result of the eviction. He also prays for punitive damages; exemplary damages and interests.

Through a joint written statement of defence, the defendant claimed no liability. Much as they admitted to have conducted the eviction, they averred that they never committed any wrong as the eviction was conducted on broad day light, the plaintiff was fully aware of the eviction as he had been served with countless notices. Also, during the eviction, he was accorded ample time to remove his properties and he duly utilized it by removing all his valuable assets thereby giving room for a peaceful eviction and demolition of the suit premise.

At the hearing, the plaintiff who was represented by Mr. Eustace Rwebangira, learned counsel, had three witnesses. Testifying as PW1, the plaintiff narrated how he become a tenant in the suit premise. He also told the court that on 2/10/1997 he expressed an interest to buy the suit premise but in response, the Government gave him a counter offer for joint development through PPP. Thereafter, he prepared a memorandum of understanding for the PPP and presented it to Tanzania Building Agency (TBA). Meanwhile he proceeded to procure/gather the necessary materials for execution of the PPP.

As he was still waiting for the PPP to materialize on 15/1/2013 at around 4:00 am a mob of about 30 men (bouncers) armed with pistols, machetes and iron bars stormed into the suit premise. Acting under instructions of the 1st, 2nd and 3rd defendant, they forcefully evicted him from the house and demolished it while he was left helpless. All his properties were taken away and his attempt to recover them ended futile. Even though he reported the incident at Central Police and the Ilala Regional Crimes Officer (RCO), he was availed no help but was told that the police were aware of the eviction and that all was in control. He was, in addition, availed copies of three letters admitted as Exhibits P3(a), P3(b) and P3(c) by which the 1st defendant authorised and commissioned the 2nd and 3rd defendant to execute the eviction.

In further substantiation of what befell him and the loss encountered, he rendered numerous documents which were admitted as exhibits. Through cross examination, it was revealed that at the time of eviction the PPP agreement had not been concluded. It was further stated that way back in February 2011 the plaintiff received a letter requiring him to relocate to a

new accommodation by 25/2/2011 but he resisted and continued to occupy the suit premise even after retirement.

PW2, Jackson Cosmas Sadick told the court that he was an eye witness to the eviction. Then, he was working for the plaintiff at the suit premise and his main duties were making of blocks using hydaform machine. He saw the eviction mob entering the house, taking the plaintiff's assets and loading them in motor vehicles. Afterwards, they drove the assets away and demolished the house and a restaurant which the plaintiff was operating in the compound. His further testimony was that, at this time, the plaintiff was helpless as the bouncers removed him from the compound and denied him entry. Just as PW2, PW3 who was then a cook at the plaintiff's restaurant testified to have eyewitnesses the incident. Her further account was that the eviction mob broke into the premise after she refused to open for them. After they have forcefully entered the premise they threatened the plaintiff with a hammer, forcefully took all his things, loaded them in motor vehicles and drove them away before they demolished the house.

On 9/5/2022, the suit came for defence hearing under a backlog clearance session to which all the parties were notified. The 1st, 3rd and 4th and their counsel defaulted appearance. Consequently, the hearing proceeded in their absence as per Order IX Rule 8 of the Civil Procedure Code [Cap 33 RE 2019].

The 2nd defendant testifying as DW1 stated that he was acting for the 1st defendant in several matters in which the plaintiff and the 1st defendant were litigating over the suit premise. He stated that, in one of those suits, the plaintiff unsuccessfully sought injunction against the eviction. After the termination of such case, he advised the 1st defendant to evict the plaintiff a duty which was later executed by him through the 3rd defendant whom he had commissioned. His further evidence was that the plaintiff being a trespasser was due for eviction. The eviction was conducted in broad day light. The plaintiff was availed sufficient time to remove his goods before the demolition and he duly utilized it by removing all his assets. On cross examination, he admitted to have been absent during the eviction and to have availed no notice to the plaintiff.

The determination of the suit shall be premised on the following four issues framed before commencement of hearing:

1. Whether the defendants trespassed to the person and properties of the plaintiff;
2. Whether the eviction of the plaintiff from house No. 15 Plot No. 223/050 was lawful.
3. Whether the defendants took away or damaged the plaintiff's properties;
4. To what reliefs are the parties entitled to.

The law of evidence places the burden of proof upon the person who alleges existence of a certain fact and wants the court to decide in his favour (see section 110 (1) and (2) of the Evidence Act [Cap.6 R.E. 2019], and **Ernest Sebastian Mbele vs Sebastian Sebastian Mbele & Others**, Civil Appeal 66 of 2019, CAT (unreported). Therefore, in this case, the duty rested upon the plaintiff to prove, on the balance of probabilities that: the defendants trespassed to his person and properties; his eviction from the suit premise was unlawful; the defendants unlawfully took away or damaged his properties in the course of eviction; and that he suffered damages as result

of the eviction and in consequences, he deserves the compensation claimed. To decide in his favour, the court has to be satisfied that the plaintiff has furnished evidence whose level of probability is higher than what has been rendered by the defendant.

Embarking on the issues for determination, I prefer to start with the second issue while I leave the 1st issue to be determine together with the 3rd issue. Principally, the second issue deals with the lawfulness or otherwise of the eviction. Answering this question demands that I first ascertain the plaintiff's interest in suit premise at the time of eviction and, thereafter, move to the eviction itself. From the evidence it is gathered that the plaintiff started to occupy the suit premise as a lawful service tenant. Through PW1 and Exhibit P1, it has been ably established that he inhabited the suit premise for 34 years from 1978 to 15/1/2013 when he was evicted. His interest in the suit premise at the time of eviction is, however, contentious. On his part, he has tried to demonstrate that he had a protected right/interest derived from the tenancy and the PPP agreement. As I shall soon demonstrate, none of the two was substantiated.

The PPP arrangement was incapable of conferring any right or interest on either of the parties. From exhibit 2P(a), 2P(b), P2(c), and P2(d) it is gathered that, much as there were prospects for PPP, the plaintiff cannot claim to have derived any interest/right from it as the deal aborted at infancy. Before it was sealed TBA changed its mind, demanded vacant possession of the premise and allocated the plaintiff an alternative accommodation at Flat No. 2 Block 'D' Mbezi Beach (Exhibit D1). Nonexistence of the PPP agreement was further substantiated through the finding of this court (Land Division) in Land Case No. 221 of 2012 (Exhibit D2) where it was held that there was no PPP agreement between the plaintiff and TBA. Hence, the plaintiff cannot claim to have derived any right or interest from the PPP agreement.

With regard to the tenancy, as per exhibit D1 whose content was amply acknowledged in PW1's testimony it is crystal clear that with effect from 25/2/2011 the plaintiff's occupation of the suit premise was without an express consent of the landlord he was required to relocate to the alternative accommodation at Flat No. 2 Block 'D' Ex-NMC Mbezi Beach. However, from the uncontroverted testimony that the rent in respect of the suit premise

continued to be deducted from the plaintiff's salary, there can be no doubt that for the period between 25/2/2011 to 14/9/2012 when he retired, he acquired the status of a statutory tenant under section 82(2) of the Land Act [Cap 113 R.E. 2019].

As for the ascending period of approximately four months reckoned from the date of retirement to the date of eviction on 15/1/2013, the plaintiff was, admittedly, neither a servant tenant nor a statutory tenant as he was not paying rent to TBA or to the 4th defendant. Having ruled out the interest purportedly derived from the PPP agreement, I am fortified that for these four months the plaintiff was devoid of any legally protected interest over the suit premise and his continued occupation of the premise was tantamount to trespass.

Regarding the eviction, the landlord's right to repossess the leased property after the termination/expiry of tenancy is unfettered. However, it need not be exercised arbitrarily and in total disregard of due legal processes. Whether the eviction is executed with or without the assistance of court, it must be preceded by a sufficient notice to the tenant. In the present case, when the

evidence is assessed as a whole it demonstrates that although the plaintiff was aware that his occupation of the suit premise was unwelcome hence his barren attempts to resist it through the Minister for Works as per Exhibit, he had no notice of the actual date and time of the eviction. As admitted by DW1, the 1st defendant's letters dated 2/1/2013 and 8/1/2013 vide which he requested TBA to evict the plaintiff and instructed the 2nd defendant to evict the plaintiff (Exhibit P3(a)) and P3(b), respectively) and the 2nd defendant's letter commissioning the 3rd defendant to carry out the eviction (Exhibit P3(c)), were never served upon the plaintiff thus, he had no notice. This was an obvious irregularity. Even if it could be assumed that the plaintiff deserved to be evicted without assistance of the court still, he was entitled to a notice and indeed, a sufficient notice. It is intriguing why the 1st and 2nd defendants found it important to notify the police of the impending eviction but took no trouble to notify the plaintiff.

Further to the above irregularity, this court has noted with great concern that much as the ownership of the suit premises passed through different hands, the 1st defendant who engineered the eviction had no title over the suit premise at the time of the eviction. As demonstrated through the

judgment of this court (Land Division) in Land Case No. 221 of 2012 (Exhibit D2) and through exhibit P4, the registered owner of the suit premise at the material time was Rasilimali Limited, the 4th defendant herein. As no proof was rendered to show that the 4th defendant authorized the first defendant or any of the three defendants to act on her behalf, it can be safely concluded that the eviction was carried out by strangers.

I am mindful of the uncontroverted evidence that the 4th defendant is solely owned by the 1st defendant as per Exhibit P6. This relationship does not, however, vest in the 1st defendant powers to act for and on behalf of the 4th defendant as a subsidiary company being a cooperate body is, in the eyes of the law, independent from its parent company and bears separate legal liability for its deeds and omissions. Thus, in the absence of proof of authorization to act for the 4th defendant, the 1st defendant cannot purport to be acting for the 4th defendant.

The most outrageous part of this eviction is the modality by which it was conducted. Through the uncontroverted testimony of PW1, PW2 and PW3 and through Exhibit P7, it has been demonstrated that the eviction was

conducted by an armed mob of people who forcefully broke into the suit premises at around 4am when the plaintiff and his family were still asleep and further to the eviction, the suit premise was demolished by an excavator. This was far inconsistent with the law pertaining to eviction of tenants. Assuming, just for the sake of argument that the 1st defendant had authority to act for the 4th defendant, the first remedy available was a peaceful eviction. Although we were not told that there was such an attempt, assuming that she tried and failed, it was incumbent for her to obtain a court order from a competent court but none was sought or obtained.

The fact that the eviction proceeded before sun set is incompressible and wicked. Just as a landlord is restricted from entering the leased property at unreasonable time, an eviction, whether peaceful or otherwise can not be carried out during night hours. In a society governed by rule of law it is least expected that a landlord or his agents would storm in the leased house at night while armed, forcefully evict the tenant and demolish the building without any court order. The foregoing attracts an affirmative answer to the second issues and it is answered accordingly. No weight is accorded DW1's testimony on this issue as he was not at scene of eviction.

Before moving on to next question, I will add that, it is of a serious judicial concern that this forceful eviction was orchestrated and proceeded under the superintendence of the 2nd and 3rd defendants who are officers of this court hence well vest with the law pertaining to evictions and the duty to strictly abide to it.

Reverting to the first issue for determination, I have been invited to consider and determine whether the plaintiff's person and properties were unlawfully trespassed by the defendants. Trespass, broadly defined as an unlawful act committed against a person or property basically involves interference with one's person or property (See **Black's Law Dictionary**, 13th Edn page 1541. Trespass to person occurs when a person directly and intentionally interferes with a person's body or liberty and may take any of the three forms, namely, assault, battery or false imprisonment (See R.F.V Heuston, **Salmond on the Law of Torts**, 13th Edition, p. 137). For the claims on trespass on person to succeed, the plaintiff had to render evidence on any of the three forms of trespass but none was rendered. All the evidence on

record concerned interference with occupation of the suit premise and the plaintiff's properties to which I will now turn.

Unlike trespass to person which involves interference of one's body or liberty, trespass to property/goods is committed when a person, without justification or lawful cause, interferes with a property or good in the possession of another person by taking it away or willfully damaging (R.F.V Heuston, **Salmond on the Law of Torts**, 13th Edition, p. 137). In the present case, PW1, PW2, and PW3 told the court that during the forceful eviction, the mob took away the plaintiff's goods and damaged others. Their evidence, considered together with Exhibit 'P7 collectively', show that, on the date of eviction, the compound was not empty. There were household items and other properties including two motor vehicles which PW1 described as make Toyota Corolla and Mercedes Benz; a container and a machine which he described as a hydraform bricks making machine (appearing in Exhibit P7 collectively)

Although PW1, PW2 and PW3's testimony that the items found in the premise were loaded in motor vehicles and taken away appears convincing, I am

hesitant to believe it in wholesome and assign it any weight as it materially contradicts with Exhibit P10. This document contains a list of items allegedly lost/taken away. In serial number 46 of the list of items allegedly lost/disappeared during the eviction, it is stated as follows:

Pamoja na kuwepo zuiio la mahakama (Status Quo) kwenye eneo langu. Tarehe 1/5/2013 wavamizi walivamia na kuwafukuza walinzi wangu waliokuwa wakilinda mali zangu katika eneo langu, na kuzingira eneo langu pamoja na kuteketeza baadhi ya mali zangu. Baadhi ya mali walizozingira kwenye uzio ni:

Container (2) zilizojazwa vifaa vya ujenzi na mali nyingine zenye thamani ya sh. 200,000,000/=

Gari moja (Toyota Corolla) thamani ya Tshs 12,000,000/=

Mercedes Benzi yenye thamani ya sh 14,000,000/=. Vitu vyote hivyo haviko tena kwenye hali ya usalama au matunzo ya kuridhisha hivyo nilipwe fidia ya vitu hivyo wavamizi walivyofungia ndani ya uzio waliojenga shs 226,000,000/=

A similar statement is repeated in the last but one page of exhibit P10. A serious doubt has consequently been cast on what happened to the items. Contrary to PW1, PW2 and PW3's story, this document credibly shows that the items were not taken away but remained in the compound under the

plaintiff's guard and custody for almost 4 months. This being a material contradiction, it is resolved in the defendant's favour that, as testified by DW1, the items listed in Exhibit P10, including the two motor vehicles and the hydraform machine appearing in Exhibit P7 collectively, were not taken away but remained under the custody of the plaintiff. Regarding the damaged items, as no tabulation of the such assets was provided to assist the court in ascertaining them, I am unable to draw a finding in the plaintiff's favour for want of materials upon which to ground such a finding. In view of what I have endeavored to demonstrate, the 1st and the 3rd issues for are answered negatively.

Lastly, with regard to the fourth issue for determination, the plaintiff claims are for judgment and decree against the defendants for payment of Tshs15,523,961,738.40 being special damages particularized under paragraphs 18 to 30 of the plaint; USD 17,000.00; general damages to a tune of Tshs 2,000,000,000/= for shock, depression, psychological torture, humiliation and disrepute which he and his family suffered as a result of the eviction. He has also prayed for punitive damages, exemplary damages and interests.

Starting with the prayers for special damages it is trite that, if a plaintiff brings an action for special damages, it is for them to prove the damages suffered (see **Harith Said Brothers Company v. Martin Ngao** [1987] T.L.R. 12 and M/S **Universal Electronics and Hardware (T) Limited v Strabag International GmbH (Tanzania Branch)** Civil Appeal No. 122 of 2017, CAT (unreported). Having found that the items allegedly lost in course of eviction remained under the plaintiff's custody, I would justifiably not dwell on the prayers for specific damages. However, for the sake of completeness, I feel obliged to proceed to examine the claims as they appear in the plaint starting with the claims in respect of the purportedly lost items listed under Exhibit P10.

For the reasons I have sufficiently demonstrated, I will append no weight to this exhibit. It is to be noted further that, even if I was to append any weight to this document, it would still not sufficiently support the prayers as it does not provide materials for quantification of the loss. No concrete evidence was rendered on how the prices appearing in the last column was obtained. Exhibits P11 (1) to P11(17) which purportedly justifies the figures appearing

in Exhibit P10 are similarly incapable of supporting a court finding on the quantum of the loss as they are mere invoices and save for Exhibit P11(16), they were procured after the date of the eviction. Thus, they have no any relation with the allegedly lost/damages properties.

Turning to the special damages allegedly occasioned to the plaintiff's wife and children, these too are destined to fail as the plaintiff has no representative authority for these persons and none of them appeared in court to substantiate the claimed loss. Similarly unfounded are the claims related to motor vehicle spare parts allegedly imported for sale from Dubai and Japan, the canteen/restaurant and the bricks making business allegedly operated by the plaintiff at the suit premise. All these claims are void of any merit as there were neither business licenses nor any credible evidence in proof that the plaintiff was conducting the said business or that he was authorized by the landlord to conduct such business at the residential premise.

The bill of quantities and the memorandum of agreement between the plaintiff and an architect (Exhibit P12 and P13) would attract no weight as

at the time of their procurement there was neither a PPP agreement nor any formal authorization for the plaintiff to rehabilitate or carry out construction works in the suit premise. Similarly unfounded are the claims that the plaintiff had started making bricks for construction and had stored building materials worth Tshs 117,353,871.85 for the PPP project. The alleged loss of two motor vehicles would similarly fail for being hypothetical and seemingly fabricated. It is beyond imagination why the plaintiff did procure duplicate registration cards from the authorities responsible for registration of motor vehicles so as to substantiate his claim.

The last claims in this item are for cost related to obtainment of qualifications, flight licenses and expected income. Just as the claims above, these too were unsubstantiated. No evidence was rendered from the Tanzania Civil Aviation Authority or any other authority responsible for issuance of flight licenses and no contract was rendered to support the anticipated loss of income of Tshs 750,482,900/=. Needless to emphasize that as held in **Harith Said Brothers Company v. Martin Ngao** [1981] T.L.R. 327, at p. 332:

"Unlike general damages, special damages must be strictly proved. I cannot allow the claim for special damages on the basis of the defendant's bare assertion, when he could, if his claim was well founded easily corroborate his assertion with some documentary evidence The claim for special damages must be, and is dismissed."

In the foregoing, the prayer for specific damages miserably fails and is hereby dismissed.

Regarding the prayer for general damages as averred in paragraph 31 of the plaint, much as the amount of Tshs 2,000,000,000 is exorbitantly high, having considered the circumstances of this case, I am fortified that the eviction, the plaintiff must have been mentally disturbed by the forceful eviction and he deserves general compensation. Accordingly, I assess and award a sum of Tshs 10,000,000/= as general damages.

The plaintiff's further prayer is for punitive/exemplary damages as per **Jowitt's Dictionary of English Law** (Second Edition), exemplary damages are punitive in nature and have a deterrence effect. They are geared at

discouraging similar wrong in future. Dealing with a similar prayer in **Peter Joseph Kilibika & CRDB Bank Public Company Ltd v Patrick Aloyce Mlingi**, Civil Appeal No. 37 of 2009, CAT (unreported), the Court of Appeal stated the following with regard to exemplary damages:

The purpose of punitive damages is to punish the defendant for outrageous misconduct and to deter the defendant and others from similar misbehavior in the future. We need to establish whether there was arbitrary and unconstitutional action, bad faith, fraud, malice, oppression, outrageous, violent, wanton, wicked, and reckless behavior on the part of the appellants in order to justify the award of punitive damages.

Thus guided I am of the considered view that this is a fit case for awarding exemplary/punitive damages. The outrageous conducts by the 1st, 2nd and 3rd defendants as demonstrated at length in the course of determining the second issue, attract punitive damages against these three defendants who are not only public officers but officers of this court. They shall jointly pay an exemplary damage to a tune of Tshs 9,000,000/= . As no cause of action has been proved against the 4th defendant, the suit against her is dismissed.

In the upshot, judgment and decree is entered against the 1,2,and 3rd defendant for:

1. Payment of general damages to a tune of Tsh 10,000,000/-; and exemplary damages to a tune of Tshs 9,000,000/=;
2. Costs of the suit
3. Interest on the decretal sum above at a court rate of 12% from the judgment to the date of full payment.

DATED at **DAR ES SALAAM** this 24th day of June 2021

X



Signed by: J.L.MASABO

J. L. MASABO

JUDGE

