

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM SUB REGISTRY)
AT DAR ES SALAAM
CIVIL CASE NO. 109 OF 2019**

SHABANI SAID MWERA.....PLAINTIFF

VERSUS

HAMIS OMARY MPU TO T/A LIGANIA STORE.....1ST DEFENDANT

THE ATTORNEY GENERAL2ND DEFENDANT

THE INSPECTOR GENERAL OF POLICE.....3RD DEFENDANT

JUDGMENT

Date of Last Order:8/7/2022
Date of Judgment: 31/8/2022

MASABO, J:-

The controversy between the parties is centered on the plaintiff's properties impounded by the 3rd defendant officers in connection with Criminal Case No. 63 of 2013 and Criminal Case No. 137 of 2015 before the District Court of Temeke at Temeke. In these cases, the plaintiff and other persons, formerly employed by the plaintiff and who are not subject to the instant suit, were charged of stealing Tshs 150,000,000/= from the 1st defendant hardware shop. The charges against the plaintiff were dismissed for want of prosecution but the goods were not returned to him. They allegedly remained in the hands of the 3rd defendant even after several requests and attempts to recover them.

Disgruntled, the plaintiff has come to this court praying for judgment and decree for payment of Tshs 50,600,000/= being special damages; Tshs

200,000,000/= as punitive damages; general damages to be assessed by the court and interests there to. All the defendant refuted the claims. The first defendant further claimed that he was a mere claimant in the criminal case hence not responsible for the seizure and retention/custody of the goods. For the 2nd and 3rd defendant it was averred further that, the seizure was well founded as the goods were associated with a reported crime. Moreover, it was averred that the seized goods were produced in court under a certificate of seizure hence not within their custody.

The following four issues stand as issues for determination:

- i. Whether the defendants seized the plaintiff's properties;
- ii. If the answer in the first issue is in the affirmative, was the seizure and continued retention of the properties after the disposal of the criminal case lawful;
- iii. Did the plaintiff suffer any damage as a result of the continued seizure and retention of the suit properties;
- iv. To what reliefs are the parties entitled to.

Led by Mr. Wilson Ogunde, learned counsel, the plaintiff had two witnesses. The plaintiff himself testifies as PW1 and one Cyprian Deogratiuous Buberwa testified as PW2. The first witness narrated how he was arrested and taken to Chang'ombe police station where he was kept under custody in connection with criminal allegations. Later on, he was searched at his hardware shop at Charambe area where his properties were impounded, loaded into a motor vehicle make Mitsubishi Canter and a Toyota Land Cruiser all of which owned by the 1st defendant. Later on, he was arraigned in court and charged in

criminal case No. 63 of 2013 before the District Court of Temeke. After sometime he was discharged but re-arrested and charged in Criminal Case No. 137 of 2015 before the same court. The case against him was later on dismissed for want of prosecution and he was acquitted. Following the acquittal, he requested to have the properties handed over to him in vain. Instead, he was told that the goods were handed over to the 1st defendant and was promised that they will soon be returned to him. In addition to his oral testimony, this witness produced court proceedings, the dismissal order and the two demand letters which were admitted as Exhibit P1, P2 and P3, respectively.

PW2, a ten-cell leader at Charambe was at PW1's shop on the date of the seizure. He was an independent witness to the seizure. He saw the police officers taking everything from the shop, and loading them in the motor vehicles. Thereafter they prepared a seizure certificate, signed it and had it counter signed by the plaintiff. He was also made to sign the same. Thereafter, the good were driven away in the two motor vehicles.

DW1, the first defendant, admitted to have reported the crime as he suspected that the plaintiff who was a store keeper for his shop had stolen from him. Apart from reporting the crime, his further involvement was merely being present on the date of seizure. He went to the scene as the victim of the crime and assisted to identify the stolen goods. Later on, after the goods had been seized, he used to assist police officers to ferry the goods to court using his motor vehicle make Mitsubishi Canter.

DW2, E27204, detective Sergeant Hassan Ayub Juma, was not an eye witness to the event. His evidence which was solely based on the documents under the custody of the 3rd defendant was that, the seized goods were stored under the custody of the 1st defendant as there was an agreement between the 1st defendant and the plaintiff to that effect. He added further that, after the dismissal of the case, no directives were given as regards the goods which had been admitted as exhibits by the court such that the goods remained under the hands of the 1st defendant.

Having provided the abbreviated transcription of the evidence, I will now proceed to the issues for determination starting with the first issue on whether the defendants seized the plaintiff's properties. This question will not detain me much as it was uncontroverted by all the witnesses. From the evidence of PW1 and PW2, it was credibly established that the plaintiff's goods were seized from his hardware shop in the course of investigation of Criminal Case No. 63 of 2013 and Criminal Case No. 137 of 2015 before the District Court of Temeke in which the plaintiff stood charged of stealing. Also, DW1 who was the victim in the two criminal cases above confirmed to have been present at the plaintiff's shop during the search and seizure and had witnessed the seizure. In the foregoing and as it will be demonstrated during the determination of the he next issue, the 1st issue is answered in the affirmative to the extent that, the plaintiff's goods were seized by officers of the 3rd defendant. As it shall be demonstrated in due course, search and

seizure of goods suspected of being involved in a crime is a legal duty vested upon the 3rd defendant as opposed to the victim of the crime/complainant. The second issue has two sub parts. The first is whether the seizure was lawful and the second is whether the continued retention of the goods after disposal of the case was lawful. As intimated in the foregoing question, the law vests in police officers' powers of search and seizure of good suspected to have been involved in a crime. The powers are derived from section 38 (1)(a) and (b) and (c); 39(a)(b) and (c) and section 41(a) of the Criminal Procedure Act [Cap. 20 RE 2022]. These provisions read together, empowers a police officer, upon obtainment of search warrant, to conduct a search of any building, vessel, carriage, box, receptacle or place and seize anything associated with an offence, that is, anything with respect to which an offence has been committed, reasonably purported to have been committed, reasonably believed to be capable of affording evidence of the commission of any offence or anything reasonably believed to have been intended to be used for the purpose of committing any offence. A seizure done under any of these circumstances is lawful in the eyes of the law. In the present case, there is no dispute that the search and seizure was ensured after DW3 reported a crime purportedly involving the seized goods. Since I was not rendered with any evidence on procedural irregularities in the seizure, it is assumed it was procedurally sound and I will, in consequence, affirmatively answer the first part of the 2nd issue.

Turning to the second part of this issue, the oral testimonies of PW1 and DW1 are to the effect that, after the seizure, the goods were loaded in motor

vehicles owned by the plaintiff and taken away under the superintendence of police officers to Chang'ombe police station. It is also a common fact between the PW1 and DW1 that, during the pendency of the case, the goods were being ferried to Temeke District Court by a Mitsubishi Canter owned by the 1st defendant. DW1 confirmed that police officers asked him to assist in ferrying the goods to court. The main contention is who had the custody of the goods before and after the same were tendered in court. PW1 has maintained that the goods were under the custody of the 1st and 3rd defendant whereas the 1st defendant has refuted the purported custody.

By their nature, these questions require me to once again navigate through criminal procedures pertaining to seizure and custody of exhibits. Principally, after seizure, the goods so seized turn into exhibits and are kept under police custody in accordance with rules and regulations pertaining to exhibits pending production in court. Upon production in court, they remain under the custody of court unless directed otherwise. After the final disposal of the case, the owner of the goods may request to have them returned to him.

To unveil what transpired in the present suit, I will turn to the typed proceedings of the District Court of Temeke in Criminal Case No. 137 of 2015. In page 27 of this document, it was deponed by one of the prosecutions witnesses that, upon seizure, the goods were placed under the custody of the 1st defendant as there was an agreement between him and the plaintiff. Wen this evidence is considered conjointly with the testimony of PW1, it appears to be a true exposition of what transpired. The second

uncontroverted revelation from these proceedings is that, the 1st defendants used to ferry the goods to court. According to his testimony, he did so at the request of the 3rd defendant officers.

A further revelation is found on page 28 of the proceedings under which shows when the properties listed in the search warrant (not produced in this court) were tendered in court on 20/6/2016 by the first prosecution witnesses one 7420 D/CPL Mponda and admitted by the court exhibit P5 collectively, they were not unloaded from the motor vehicle. As per the law, objects admitted as exhibits remain under the custody of the court unless otherwise directed by the court. In the present case, the proceedings are silent hence a presumption that they remained under the custody of the court. The plaintiff's claim that they were placed under the custody of 1st defendant is a rebuttal. In fortification of this rebuttal, PW1 and DW1's testimony reveals that after the admission as exhibits, the goods were driven away in the same motor vehicle to a disputed destination. PW1 has claimed that he was told that they were placed under the custody of the plaintiff whereas DW1 denied such allegation. DW2 who ought to have resolved this quagmire was unfortunately not of much help. His account was solely based on what was relayed to him orally by the officers of the 3rd defendant. Hence, it attracts no weight for being merely hearsay. This notwithstanding, it remained uncontroverted that the goods were not returned to the plaintiff and after follow up with the 3rd defendant officials, he was told to wait. But, as of the date of hearing, the goods have not been returned to him. As the criminal charges against the plaintiff was dismissed for want of prosecution

and no appeal was preferred against the dismissal order, there can be no doubt that the plaintiff was entitled to recover his goods by following the procedures pertaining to recovery of goods admitted as exhibits. The procedures are set out under section 353(1) and (3) of the Criminal Procedure Act [Cap 20 RE 2019] which provides that:

353.-(1) Where anything which has been tendered or put in evidence in any criminal proceedings before any court has not been claimed by any person who appears to the court to be entitled thereto within a period of twelve months after the final disposal of the proceedings or if any appeal is entered in respect thereof, the thing may be sold, destroyed or otherwise disposed of in such manner as the court may by order direct and the proceeds of its sale shall be paid into the general revenues of the Republic.

(3) Notwithstanding the provisions of subsection (1), the court may, if it is satisfied that it would be just and equitable so to do, order that anything tendered, or put or intended to be put in evidence in criminal proceedings before it should be returned at any stage of the proceedings or at any time after the final disposal of such proceedings to the person who appears to be entitled thereto, subject to such conditions as the court may see fit to impose.

Two things are discernible from these provisions. The first is the right of the owner of the goods to recover them and his corresponding duty to claim

them. The second is that, goods received as exhibits can only be returned to the owner by an order of the court made upon satisfaction by the court that the return of the goods to the owner is just and equitable. In the absence of such order the goods cannot be returned. As the provision above makes no distinction between exhibits kept within court premises and those otherwise kept under the custody of the complainant or any other person/institution at the directive of the court, as it appears to be the case here, it is gathered the procedure applies across the spectrum.

Now that it is crystal clear from the evidence that no claim was made to the court and there was no order for return of the goods to the plaintiff, the defendants cannot be faulted as the good could not have been returned to the plaintiff in the absence of a court order. Considering that the plaintiff was represented, I am tempted to say that has none but himself and his counsel to blame for wrongly directing his claim to the 3rd defendant who could not have legally returned the goods to him in the absence of a court order. In the foregoing, the second issue on whether the seizure and the continued detention of the goods were lawful is answered in the affirmative.

The third and fourth issues deal with damages and the specific question to be answered is whether the plaintiff suffered any damage as a result of the continued retention of the suit properties. Having found the retention of the goods to be lawful, I will not advance further on these issues as they have been naturally disposed of.

The upshot is that, the suit fails and is dismissed. Considering the circumstances of the case, I find it fair and just that the costs be shared by each of the parties bearing its respective costs.

DATED at Dar es Salaam this 31st day of August 2022.

X



Signed by: J.L.MASABO

J.L. MASABO
JUDGE

Judgment delivered remotely via virtual court this 31st day of August, 2022 in the presence of Mr. Victor Mhana, counsel for the plaintiff and the 1st Defendant appearing in person and in the absence of the 2nd and 3rd defendants.

X



Signed by: J.L.MASABO

J.L. MASABO
JUDGE

