

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR-ES-SALAAM DISTRICT REGISTRY)

AT DAR-ES-SALAAM

CIVIL APPEAL NO. 366 OF 2021

HENRY MICHAEL DOMZALSKI APPELLANT

VERSUS

HASSAN NGONYANI 1st RESPONDENT

LESCA HASSAN 2nd RESPONDENT

GEORGIA KAMINA 3rd RESPONDENT

BEACH FRONT LIMITED 4th RESPONDENT

(Appeal from the judgment and decree order of the District Court of Kinondoni at
Kinondoni)

(D. D. Mlashani, RM)

Dated 10th day of November 2021

In

(Civil Case No. 235 of 2019)

JUDGMENT

Date: 17/07 & 14/08/2023

NKWABI, J.:

This appeal arises from a judgment and decree of the district court of Kinondoni district at Kinondoni. The appellant sued the respondents for the reliefs emulated below:

- a. An order declaring the acts of defendants subject to this suit as per paragraph six and eleven above were with no legal backing hence illegal.

- b. An order declaring the continued acts of the defendants to prevent the plaintiff from having his personal effects which has been withheld in the house at plot No. 77/2, Msasani Beach area, own by the 4th defendant are with no legal backing hence illegal.
- c. An order that the defendants are liable for tort of trespass, conversion, damages to properties and detenue.
- d. An order that the plaintiff is entitled to have his personal effects at house situated in plot No. 77/2 Msasani Beach area, owned by the 4th defendant.
- e. In alternative to relief (d) above, the defendant to pay an amount of USD 50,000/= or its equivalent to T.shs 120,000,000/= which is the value of plaintiff's personal effect, excluding documents which have no alternative.
- f. An order for general damages to be assessed by the court.
- g. An order for payment of 31% interest per annum on relief (e) above from the date of filing this suit to the date of judgment.
- h. An order for payment of interest at court rate in reliefs (e) and (g) above from the date of judgment until payment in full.
- i. Costs of the proceedings be provided for.
- j. Any other reliefs this honourable court may deem fit to grant.

It was decreed by the trial court as the underneath:

1. An eviction of plaintiff by the defendants from his residence was unlawfully and illegal.
2. The defendants are liable with a tort of trespass, conversion and detinue.
3. Plaintiff is entitled to all his personal effects as listed in the inventory (exhibit P3) or be compensated USD 30,000/= from the defendants for the loss of his personal effects
4. The plaintiff is entitled to general damages of T.shs 15,000,000/= fifteen million.
5. The plaintiff is awarded interest of 8% per annum from the date of judgment to sate of full payment.
6. Costs to follow the suit.

Aggrieved by the judgment and the decree of the trial court, the appellant has filed a memorandum of appeal comprising 3 grounds of appeal about to be specified:

1. That, the trial resident magistrate, having decided that the respondent illegally invaded and evicted the appellant (plaintiff by then), and that the respondents are illegally withholding the appellant's personal

belongings, he then erred in law and facts by not ordering the return of the said personal belongings to the appellant as they were at the time of the said illegal invasion and eviction, or in alternatively he erred in law and facts in awarding compensation thereof less than the value claimed for the personal belongings and without reasons.

2. That, the trial resident magistrate, having decided that the respondent illegally invaded and evicted the appellant (plaintiff by then), and that the respondents are illegally withholding the appellant's personal belongings, he wrongly applied his judicial discretion to award general damages in a very small amount of money compared to the suffering the appellant faced, regards being paid to appellant status as high-ranking retired officer of the United Nations Organisation.
3. That, the trial magistrate erred in law and fact for skipping or not deciding or resolving on some of the reliefs prayed by the appellant (plaintiff by then) most notably the issue of the illegal withholding of the appellant's documents.

It is based on the above justifications of appeal that the appellant is asking this Court to grant him the following reliefs

- i. That the appellant is entitled to the return of his personal effects (as they were at the time of the invasion/eviction), or in alternatively the compensation thereof equal to the value of the personal effects at the tune of USD 50,000/=.
- ii. That the general damages be uplifted to the amount not less than Tanzanian shillings one hundred million (T.shs 100,000,000/=).
- iii. That the appellant's documents which are being illegally withheld by the respondents be returned/handed over to the appellant.
- iv. Costs be provided for in favour of the appellant before this Court and trial court.

The hearing of this appeal proceeded by way of written submissions. Mr. Killey Mwitasi, learned counsel drew and filed the written submission in chief and also filed a rejoinder submission for the appellant. Mr. Edson O. Mbogoro, also learned counsel, drew and filed the reply submission. I am thankful to both counsel for their submissions.

Looking at the reliefs claimed in this appeal and the arguments thereof, I am of the view that this suit and the appeal thereof are redundant. The suit was filed in the trial court on 27th September 2019 (in other words res judicata of the decision of this Court delivered by Ismail J., on 11th July, 2023 in Civil

Case No. 99 of 2019. According to the JSDS, the suit in the High Court was filed on 13th August 2019 which I take judicial notice of its judgment. The judgment of the High Court in Civil Case No. 99 of 2019 was brought to this Court or rather the case file on this appeal by Ms. Farida Ibrahim, learned counsel who appeared for the appellant in Court on 17th July, 2023, in which judgment, the learned judge gave a decree in the following reliefs:

- a. A declaration that the transfer of shares from the plaintiff to 1st, 2nd, and 3rd defendants is irregular and, therefore, nullified;
- b. A declaration that the status of the shareholding and directorship in the 4th defendant is as it was on 31st December, 2002;
- c. Payment of general damages to the plaintiff to the tune of T.shs 100,000,000/- for damages suffered;
- d. Payment of interest on (c) above at the rate of 17% per annum from the date hereof to the date of full settlement; and
- e. Costs of the matter be paid to the plaintiff.

It appears to me that all this time, the appellant has been riding on two horses, and involving himself in forum shopping. It seems that the cause of action on both suits arose from the same transaction of removing the appellant from being director of the 4th respondent. The appellant has

obtained the decree that he returns to his being director and shareholder of the 4th respondent. So, by virtue of that decree, the 4th respondent will definitely restore him to the house which he was evicted from and where the personal effects were kept. In the same vein he has to get custody to the personal effects.

He got general damages in the suit that was in the High Court. He demands for general damages to the tune of 100,000,000/= over the same cause of action (wrong) in this appeal. That is unacceptable. Damages are not for enriching any party. I need not cite an authority for this position of the law.

Since the appellant has been riding on two horses all this time, (res subjudice case in the trial court) and now res judicata of Civil Case No 99 of 2019 in this Court, the appellant is in abuse of the Court process as stated in **Managing Director, ABSA Bank (T) Ltd (Formerly known as Barclays Bank (T) Ltd v Felician Muhandiki**, Civil Application No. 37/01 of 2021 CAT (unreported) where it was stated that:

"By keeping both applications alive, the applicant was indeed riding two horses; the practice abhorred by the courts and, aside from being unprocedural, was also an abuse of the Court process."

The appellant too can be said was indulging himself in forum shopping which has been discouraged in the case of **the Registered Trustees of Kanisa la Pentekoste Mbeya v. Lamson Sikwazwe & 4 Others**, Civil Appeal No. 210 of 2020 CAT (unreported) at page 9 it was held:

"Forum shopping is not less than abuse of court process. ... riding two horses at the same time is an abuse of court process."

It is quite striking that both suits were drawn and filed by the same law chamber office of advocates. The acts were done under the umbrella of the 4th defendant (respondent) in this case who has distinct personality from its directors and shareholders.

The appellant seems to have made the 1st respondent as first defendant just to disguise the true nature of the suit. He seems to want to enrich himself over the same transaction or facts. The same amount of general damages granted in another suit which was filed in the High Court, is being claimed in this suit which seems to have been filed in the trial lower court to disguise that the appellant was riding two horses at the same time.

The appellant cannot be allowed to cleverly craft the pleading to circumvent the law that he was riding two horses at the same time. I take judicial notice

of the decision of my learned brother, Ismail, J. in Civil Case No. 99 of 2019 which was filed in the High Court of Tanzania, while the suit in the present appeal (Civil Case No. 235 of 2019) was filed in the District Court of Kinondoni at Kinondoni. Cleverly drafting a plaint will not make a court of law to have jurisdiction it does not have. That is the position of this Court in **Mark AD and PR International (T) Ltd v. Stanbic Bank Tanzania Ltd** [2011] TLR 244 HC and the Court of Appeal of Tanzania in **Tanzania Revenue Authority v. New Musoma Textile Limited**, Civil Appeal No. 93 of 2009 CAT, (unreported) among other cases, it was held that:

*"The second answer provided by Mr. Magongo to the issue, is that there was no reference to any tax dispute in the body of the plaint or prayers. The answer to that is provided by this Court in **KOTRA's** case. Where the decision of the Indian case of **RAM SINGH vs. GRANPANCHAYAT** (1986) 4 sac 364 AIR, 1986) SC. 2197 was approved. In the latter case it was held that where the civil Court's jurisdiction is excluded, the plaintiff cannot be allowed to circumvent the bar by the clever drafting of the plaint."*

The appellant, on the 2nd ground of appeal has been pressing for enhancement of the amount awarded by the trial court as general damages since the appellant has suffered and he was a high ranging officer of the UN. The counsel for the appellant exemplified the case of **Japhet Tumainiel Lyimo & 2 Others v. Francis Zephania Mollel**, Consolidated Civil Appeals No. 32, 37 and 39 of 2021, HC (unreported). But that case is distinguishable to this case, because in that case the one who was awarded general damages at enhanced amount had suffered 95% of incapacitation, but in this case the appellant is a retired officer, further, I do not think in that case, the person who was awarded such damages was riding two horses at the same time.

Turning to the documents and other personal effects, since the appellant was adjudged the in-charge of the 4th respondent as a major shareholder, then he has the capacity to retain the properties, there is no need of giving such order. In the circumstance, I may be entitled to say that in not including the claim for the personal effects in the civil case that was filed in the High Court, the appellant had relinquished his claims against the parties who were not sued in Civil Case No. 99 of 2019 as per Order II Rule, 2 (1), (2) and (3) of the Civil Procedure Code. In any way the counsel for the respondent

argued that giving such order would amount to double compensation. I totally agree with the argument of the counsel for the respondent. The appellant being declared the major shareholder and director of the 4th respondent which owns the house in which the personal effects are kept, then that order suffices as restoration of the personal effects kept therein to the appellant. The appellant too got general damages to that case, there is no need of ordering any amount for general damages in this appeal.

To sum up, the appeal is dismissed. Judgment and decree of the trial court are quashed and its orders are set aside because the trial court entertained a suit which was res subjudice of the civil case No. 99 of 2019 which was then pending in the High Court. The appellant has to bear the costs of the respondents. It is so ordered.

DATED at **DAR-ES-SALAAM** this 14th day of August, 2023.



[Handwritten signature]

J.F. NKWABI

JUDGE