IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

LAND CASE NO. 9 OF 2018

BLUE PEARL HOTELS AND APARTMENTS LIMITED .....PLAINTIFF

VERSUS

UBUNGO PLAZA LIMITED.....1st DEFENDANT

ATTORNEY GENERAL.....2nd DEFENDANT

JUDGMENT

13th July & 31st August 2023

MWANGA, J.

The Plaintiff, **BLUE PEARL HOTELS AND APARTMENTS LIMITED,** entered into a Lease Agreement with the 1st Defendant, **UBUNGO PLAZA LIMITED,** on 19th October 2006 for 15 years. The leased suit premise was to operate a hotel and apartment business. Under Clause 2.1 of the Lease Agreement, the Plaintiff agreed to pay rent, Building Service Charges, and Utility Charges in the manner set out in the Lease Agreement.

It appears that Plaintiff had some reservations on the suitability of the leased premises as agreed. According to the plaintiff, there were some leakages on top of the floor, rendering forty rooms unusable; the lift of the thirteenth stories was not working, and escalators and generators were also not working. The plaintiff contended that the defects had not been rectified for more than seven years since the signing of the agreement.

It followed that the legal battles started between the plaintiff and 1st defendant. On the 10th of December 2013, the plaintiff referred the dispute to Arbitration, where the arbitral award was made in favor of the plaintiff. The 1st defendant successfully challenged the award in the High Court Commercial Division in Commercial Case No. 145 of 2014, where parties were ordered to conduct fresh arbitration. The plaintiff was aggrieved. Hence, he appealed to the court of appeal, and the matter is still pending.

The plaintiff alleged further that while the appeal was pending before the Court of Appeal, on the 21st of September 2014, the 1st Defendant, through Majembe Auction Mart, evicted her from the leased premises on claims of breach of contract. The plaintiff stated that the eviction was done without any Court order, notice, or adherence to any legal procedures.

Thus, the Plaintiff challenged the eviction process through Land Case No. 298 of 2014, to which the Court overturned the eviction and restored the Plaintiff to the leased premises one month after the eviction occurred. Allegedly, since the restoration on the 19th October 2014, the 1st Defendant neglected to service and remedy faults and defects on the suit premises as required by the lease agreement. As a result, the 1st Defendant went further by depriving Plaintiff of free parking spaces of 135 spaces that were used to accommodate conference guest vehicles, contrary to Clause 1.0 of the lease agreement. According to the plaintiff, the 1st Defendant converted that parking into a charging system.

Apart from the defects claimed by the plaintiff, she stated that the eviction on 21st September 2014 tarnished her reputation within the hospitality industry. Few people were procuring his services, but he still paid rent and abided by all terms between the parties to the lease agreement even after the 1st Defendant had been in continuous breach and failed to rectify the damages and defects.

Per contra, the 1st defendant insisted that the plaintiff did not pay rent arrears, the breach of which the 1st Defendant filed Land Case No. 31 of 2016 on 25th April 2016, claiming for, among other things, outstanding rent up to

31st March 2016, vacant possession of the demised premises and costs of the suit.

On 3rd November 2017, the Court delivered the judgment whereby the Plaintiff was ordered to pay the 1st Defendant USD 1,407,319.86, an outstanding rent arrears. The Court further held that given the material and fundamental breach of the Lease Agreement, Plaintiff should vacate from the demised premises and leave the same vacant.

The record is clear. The plaintiff did not vacate the demised premises as ordered by the Court, an act which compelled the 1st Defendant to evict the Plaintiff from the demised premises on 9th November 2017, which is almost six days from the date of court order. With eviction, the 1st defendant also locked and seized the plaintiff's properties. Among others, 37 cars were hired by the plaintiff for his business.

The Plaintiff was aggrieved by the eviction, claiming that the 1st defendant evicted her from the leased premises without following the legal procedures; hence, this suit seeking the following reliefs:

(a). A declaration that the eviction effected by the 1st Defendant without recourse to any court of law is unlawful.

(b). An order directing the 1st Defendant to release all items belonging to Plaintiff and third parties seized and locked.

(c). For payment of compensation for the losses suffered by Plaintiff as a consequence of the 1st Defendant's unlawful, unjustifiable, and unwarranted acts in particular;

(i). Loss of business, reputation, and damage to the tune of Tanzania Shillings Three Billion and Two Hundred Million (3,200,000,000)

(ii). Damages for wrongful eviction Tanzania Shillings One Billion Five Hundred Million.

(iii). Tanzania Shillings Eighty-nine Million (89,000,000) being the unnecessary amount paid to employees and cost of the suit.

(iv) Tanzania Shillings One Billion Seven Hundred Million (TZS 1,700,000,000) being refunded for the assets unlawfully withheld in the 1st Defendant premises

(d). Interest on the above of 12% from the filing date to the date of judgment.

(e). Interest on the decretal amount of 9% from the date of judgment to the date of actual payment

(f) Cost of the suit

In reply, the Defendants lodged a written statement of defence disputing all the claims and putting the plaintiff into strict proof. The defendants contended that the eviction on 9th November 2017 was carried out lawfully. Again, the eviction dated 24 September 2014 is the subject of Land Case No. 298 of 2014, which was struck out with costs; after that, the plaintiff is still striving to restore the said suit. The defendant called it *res subjudice* related to Land Case No. 298 of 2014.

Likewise, the defendants called the alleged non-repair and maintenance allegations res subjudice in Miscellaneous Commercial Case No. 145 of 2014 and the intended appeal to the Court of Appeal. According to the defendant, Plaintiff took possession of the leased premises in good condition to the plaintiff's satisfaction.

Furthermore, the defendants pleaded that the plaintiff is entitled to no compensation for the amount stated nor the costs of the case. It was pleaded that the claim for any refund for the purported guests and cancellations of bookings for hotel rooms and conference hall had no merits because they

were the consequence of the court judgment which ordered the eviction of the plaintiff.

On top of that, the plaintiff who had defaulted to heed and pay rentals as per lease and the law and was condemned as such in the courts; judgment and decree of the court cannot suffer any loss of business, reputation, or trust as alleged in the process of execution of the lawful judgment of the court.

In conclusion to the defendant's WSD, a professional auctioneer, Yono Auction Mart & Company Limited, carried out the eviction exercise smoothly and peacefully**.**

The defendants also raised a Counter Claim and prayed for the following orders;

i. An order for payment of USD 1,702,507.95 being rental arrears
ii. An order for payment of general damages to the tune of TZS 4,000,000,000/= or any other sum as shall be assessed by the Court for breach of contract and inconveniences.
iii. Interest on (1) above at the commercial rate of 20% from the due date to the date of judgment in the counterclaim.

iv. Interest on the decretal sum at the rate of 12% from the date of judgment to the date of satisfaction of the Decree.

v. Costs in the Counter-Claim.

The Framed issues for my consideration are as follows:

a) Whether the eviction of the Plaintiff from the premises was legally conducted.

b) If the answer is in the affirmative, whether the Plaintiff suffered a business loss

c) Whether the Plaintiff to the Counter Claim is entitled to the arrears of rent and services charges to the tune of 1 702,507.95 from 1st April 2016 to 9th November 2017

d) To what relief are the parties entitled?

Witness statements heard the case. Plaintiff and Defendant paraded one witness each. PW1, Mr. Rustamali Shivji Merani and DW1 was Nyembo Kigombey. Both the Plaintiff and Defendants tendered five (5) exhibits each. Ultimately, both parties filed final written submissions, which I shall not reproduce but use in my judgment where necessary.

In the first framed issue, it is evident from the testimonies by PW1 and DW1 that the judgment of the Court in Land Case No. 31 of 2016, among other things, ordered the plaintiff to vacant possession of the suit premises. And that it was issued on 3rd November 2017 and executed by the 1st defendant on 6th November 2017. According to PW1, she immediately appealed to the Court of Appeal by filing a Notice of Appeal on 7th November 2017. He also revealed that, on the 9th November 2017, the 1st Defendant, with his agents and without any court order or service of any notice to the Plaintiff or following any legal procedures, unlawfully evicted the Plaintiff and its employees from the leased premises. The plaintiff contended that the eviction was not carried out per the court or per the lease agreement, which requires a 3-month notice for termination under Clause 8.0 in Annexure MA-B1. The plaintiff testified further that the 1st Defendant and his agents also evicted some guests in the hotel and forced the cancellation of reserved guests and conference facilities.

On the other hand, the 1st defendant, through DW1, testified that a 30-day Statutory Notice on the Plaintiff was issued after the judgment and decree of the Court dated the 3rd day of November 2017 ordering the Plaintiff to give vacant possession of the premises as ordered by the Court, failure of which

the 1st defendant decided to evict the Plaintiff on **9th November 2017**. According to him, the eviction that was effected on **9th November 2017** was carried out and made in terms of the judgment and decree of this Court dated the **3rd day of November 2017**.

In his submission, the counsel for the plaintiff, Mr. Shalom, started his submission on what the eviction entails. It was his view that, unfortunately, the Land Act No. Cap. 113 of R.E 2019 (The "Land Act") does not provide for a clear definition of unlawful eviction apart from the narration of section 110 of the Land Act, which states that: -

> ***"A lessee who, contrary to the express or implied terms and conditions of a lease, is evicted from the whole of a part of the leased land or building, is not, ...as from the time of the eviction... [Emphasis is ours]"***

The counsel referred to the Cambridge Dictionary, which defines eviction as forcing someone to leave somewhere, especially their home. *He also referred to the Oxford Dictionary's definition as moving* someone to leave a house or land, especially when you have the legal right to do so.

Apart from that, the counsel made submissions in the following areas. **First,** in terms of Sections 101(1), (102) (1), 103 (1), and 104(1) of the Land Act [Cap. 113 R.E 2019], there are two ways the Lessor can use to evict the tenant for failure to pay rent due. **Second,** the Lessor serves a notice of intention to terminate the lease agreement to the tenant under section 104 (2), which outlines the mandatory contents of the notice of termination, namely, stating the total amount of rent the tenant owes the Lessor. This amount must be paid to settle the claim, and the period is at least 30 days from the date of the service of the notice within which the rental arrears must be paid. According to him, if the rent is unpaid within the prescribed time, the tenancy may be terminated without much ado. The counsel argued that any eviction following the termination has to be carried out by court or tribunal brokers following notice procedures. **Third,** Section 109 of the Act stipulates that once the lessor has opted to pursue the recovery of rent in the court competent to try such a matter, they are not allowed to evict the tenant from the suit premises until the issue is the conclusion of the proceedings and if there is an appeal, is decided. **Fourth,** during the trial, it was established that the 1st Defendant forcefully and in an uncivilized manner evicted the Plaintiff from the suit premise by way of a lockout; according to him, on the 9th

November 2017, there was no court order that effect nor notices as required by law to conduct such an exercise.

To distinguish the terms eviction and vacant possession, the learned counsel argued that the 1st defendant insisted they were enforcing the Judgement and Decree of this case in Land Case No. 31 of 2016. However, the Judgement and decree in land case No.31 of 2016 do not order an eviction, among other orders. On the contrary, it allowed the plaintiff to give vacant possession. According to him, the judgment and decree do not expound on the timing of providing vacant possession either.

The counsel referred to the definition of "Vacant possession" as defined in the case of **NYK Logistics Ltd Verus Ibrend Estates (2011) EWCA Civ 683 at para 44,** where Rimer LJ described it as;

> ***"that the property is empty of people and that the purchaser can assume and enjoy immediate and exclusive possession, occupation, and control of it. It must be empty of chattels, although the obligation in this respect is likely only to be breached if any***

chattels left on the property substantially prevent or interfere with the enjoyment of the right of possession of a substantial part of the property."

The counsel added that the position was further propounded in the case of **Riverside Park Ltd v. NHS Property Services Ltd (2016) EWHC 1313 (Ch),** where it was emphasized that vacant possession includes the requirement for the property to be free from any legal or equitable rights that could inhibit or restrict the buyer's/owner's occupation, such as leases, licenses, or other third-party interests.

The counsel insisted that given the positions stated, Plaintiff was to grant the 1st Defendant a peaceful handover free from any legal or equitable rights or claims and from the property or third-party interest. But that was not the case at hand as the Plaintiff did have an interest in the suit premises, hence the filing of the Notice of Appeal only three days after the deliverance of the judgment and decree. Further, there were still other third-party interests as properties were held therein, which are withheld up to this date after the eviction.

According to the counsel, it is a trite principle of law that in the absence of peaceful compliance with the vacant possession order by the Plaintiff, then the 1st Defendant ought to seek court intervention by way of execution. The counsel referred to the case of **Shell and B.P. Tanzania Limited Versus University of Dar Es Salaam [2002] T.L.R. 225** on pages 232-3. He submitted that, in the present case, as contended, there was no peaceful vacant possession as the matter is still in contention, and the Plaintiff holds interest in the suit with litigation on the case pending before the court to date; hence, the only way was to resort to the court, which passed judgment and decree for its assistance in execution of the referred decree.

The counsel concluded that evidence of DW1 that they were enforcing a decree in respect of Land Case No. 31 of 2019, which is entirely not true as the order was for vacant possession, which was to be done by Plaintiff and not for eviction by the 1st Defendant. Hence, the 1st Defendant did not follow the rules on execution of that decree as stipulated in the Civil Procedure Code, 1966, as revised from time to time.

The counsel also referred to the case of **Balozi Abubakari Ibrahim and Another vs. MS Benandys Limited and two others**, Civil Revision No. 06 of 2015, where the Court of Appeal at Page 30 held that;

"Execution of decrees is a judicial function and ought to be carried out transparently, efficiently, and judiciously. That being the case, the Highest degree of discipline and care is expected from all concerned court officers in carrying out this duty. ***Noncompliance with the mandatory legal provisions relating to the execution of decrees occasioning material irregularities may lead to vitiations of the entire processes,*** *the same way irregularities lead to nullification of trials of suits."(****emphasis is mine).***

Given the above, the counsel contended that no execution application was made into this court, which passed the Judgement, and subsequently, no order of eviction was ever made. The eviction of the decision was not backed up by any order or provision of the law in that matter. And that, throughout this trial, there is nowhere the 1st Defendant gave evidence of notices in terms of section 104 of the Act or about the eviction by the brokers. The Defendant's only witness relied on the judgment and decree of the court.

The counsel provided that the provision of sections 100- 110 of the Land Act provides for procedures for relief and remedies. The 1st Defendant did not present evidence that they strictly adhered to the requirements, particularly of notices. Moreover, the evidence is that they acted with little attention to any of them.

Ultimately, the counsel summarized that the 1st Defendant violated the law mentioned above provisions by, **firstly,** evicting Plaintiff without any lawful order, having preferred to terminate and claim rent arrears through court, **secondly**, by failing to issue relevant notices as stipulated in the said provisions, and **thirdly**, by confiscating properties of the Plaintiff and third parties.

Mr. Joshua Webiro, the learned State Attorney, made a brief and concise submission. He contended that after the Court issued the vacant possession order, the Lease Agreement between the Plaintiff and the Defendant ceased to have legal force. He said the relationship between the Plaintiff and the 1st Defendant of tenant and Landlord ended. According to him, Plaintiff's continued stay in the demised premises was, therefore, illegal, and Plaintiff was a trespasser in the demised premises.

The learned State Attorney referred to the evidence of PW1 in cross-examination, admitting that it was illegal for Plaintiff to stay in the demised premises after the Court pronounced an order of vacant possession. To him, since the Plaintiff turned out to be a trespasser after the judgment of the Court had ordered for vacant possession, she was not entitled to be informed as complained by the PW1 in his testimony. Therefore, he believed the 1st Defendant legally carried out the eviction. He supported his contentions in the cited Court of Appeal case of ***Lawrence Magesa T/A Jopen Pharmacy vs. Fatuma Omary and Another Civil Appeal NO. 333 of 2019 [Unreported].***

Elaborating the above decision by the court, Mr. Joshua Webiro submitted that in the abovementioned case, the tenant whose Lease agreement had expired refused to vacate the premises; he was therefore evicted. Aggrieved by the eviction, she filed a suit, praying for a declaratory order that the eviction was unlawful, but ended up defeated.

The counsel also emphasized the above principle as reinstated in the case of **Tamal Hotels and Conference Centre Limited vs. Dar es Salaam Development Corporation Civil Appeal No. 33 of 2020 [Unreported]** on page 10, where the Court held that;

"Since in both ways, the appellant has failed to justify her continued occupation of the suit premises, and we agree with the respondent's attorneys that she was a trespasser from 1/11/2013.…a person whose entry is lawful becomes a trespasser if he continues to occupy another's premises beyond the period permitted.

In conclusion, the learned State Attorney found the totality of the submissions that the eviction of the plaintiff, who called her a trespasser at the time of the eviction, was lawful.

I have reviewed the pleadings, evidence adduced, and the parties' submissions in this first issue. As rightly put by the parties, the contentious issue here is whether the execution of the court order dated 3rd November 2017 by the 1st defendant was unlawful. Admittedly, by both parties, the 1st defendant executed it almost six days after the court's order, from 3rd to 9th November 2017.

Additionally, it is undisputed that the 1st defendant locked and seized assets in the plaintiff's possession at the time of eviction, including 37 rented vehicles used in the hotel and apartment business of the plaintiff.

DW1, together with the learned State Attorney Mr. Webiro, on his submission, insisted that the eviction exercise was carried out smoothly and peacefully by a professional auctioneer, **YONO AUCTION MART AND COMPANY LIMITED**. According to DW1, the process went very peacefully and without resistance from the plaintiff or subtenants. In his submission, the leaned State Attorney contended that, since the plaintiff turned out to be a trespasser after the court's judgment had ordered vacant possession, she was not entitled to any notice before eviction. In support of his contentions, the learned State Attorney referred to the case of ***Lawrence Magesa T/A Jopen Pharmacy Versus Fatuma Omary and Another and Tamal Hotels and Conference Center Limited Versus Dar es Salaam Development Corporation***(supra).

To a greater extent, the cases cited above are highly distinguishable from the present case. **First,** those are cases where the judicial process was not invoked, hence no court order. **Two**, the lease agreements in those cases had already expired. **Three,** no period was prescribed for the plaintiff to vacate the premises, possibly with a view that if she did not provide vacant possession peacefully, then the court, through execution proceedings, would order for eviction.

During cross-examination, DW1 replied that the first defendant issued notice to the plaintiff, which is unsupported. He also replied that no handover documents were produced to show that the plaintiffs' properties were handed over to her. According to him, the Court broker, Yono Auction Mart, was involved in the process, and he acted professionally.

In essence, the order of the court was for vacant possession. Nowhere was it indicated that the 1st defendant should lock and seize the plaintiff's properties. On page 33 of the typed judgment, which was executed, the trial judge held that;

> *"…(i) I finally declare that given the material and fundamental breach of the lease agreement by the 1st defendant as portrayed above,* ***the plaintiff is entitled to a vacant possession of the leased premises. "(emphasis is mine).***

Given the above, I believe that the 1st defendant acted beyond the court's order as the order was for vacant possession only, and the court ordered no seizure of the properties. Again, the court's order was executed by the 1st defendant without resorting to due process of the law, hence illegal. Order XX1, Rule 9 provides, thus.

"When the holder of a decree desires to execute it, he shall apply to the court which passed the decree or to the officer (if any) appointed on this behalf, or if the decree has been sent under the provisions herein before contained to another court then to such court or the proper officer thereof."

The court of appeal, in the case of **Balozi Abubakari Ibrahim and Another Versus MS Benandys Limited and two others**(supra), has given its construction of the provision of the law above that:

"The above provision notwithstanding, it is trite law that a decree holder need not invoke the court's assistance to satisfy the decree in his favor if he can do so peacefully...However, if a decree-holder opts to seek the court's assistance, the law must be strictly complied with by all in the process."

If I may understand the defendants well, it is that they never sought court assistance because the exercise was carried out smoothly and peacefully, the allegation which the plaintiff controverts. On the other hand, the plaintiff, through PW1, claims that the process was coupled with a lack of peace, ultimately seizing the plaintiff's properties, cancellation of guests'

reservations, and payment of employees' benefits. He also contended that, soon after the court's judgment, within four days, she preferred an appeal to the Court of Appeal. The defendants claimed that a professional broker, Yono Auction Mart, performed the exercise.

Let me pose here for a while. In all fairness, I do not see the alleged court broker's professionalism. It may be recalled that the judgment and decree of the court were delivered on 3rd November 2017. The eviction was done on 9th November 2017, almost six days from the date of judgment and order. If a notice was issued to the plaintiff, which is doubtful as DW1 produced no information, the broker might only have issued six days' notice, which does not exist in our laws. Clause 9.6 of the Guidelines for Court Brokers and Court Process Servers, August 2019, provides that:

> *"The Court Broker shall serve the Judgment Debtor* ***a notice of not less than 14 working days*** *to settle the Decree of the Court. Suppose the Decree is not settled within 14 days of the notice. In that case, the Decree Holder should file a search report and cause the property in question to be evaluated by a competent person or authority in Court if the property is registered land".*

Moreover, clause 9.5 provides that the Court will issue an attachment Order to the Court Broker where the Decree will be executed through attachment. This tells that the seizure of actual property and keeping the property in custody, among others, the 37 cars of the plaintiff had no legal basis. All that was stated above indicates no peace during the eviction.

The law is settled. In the case of **Balozi Abubakari Ibrahim and Another Versus MS Benandys Limited and two others**(supra), it was held that;

> ***"The Execution of decrees and orders is an inherent component of the administration of justice. It is the culmination of the entire process and cannot escape public scrutiny and comment, let alone judicial interventions where the interest so-demands".***

In the same cited above case, the Court of Appeal at Page 30 held that;

> ***"Execution of decrees is a judicial function and ought to be carried out transparently, efficiently, and judiciously. That being the case, the Highest degree of discipline and care is expected from all concerned court officers in carrying out this***

duty. Noncompliance with the mandatory legal provisions relating to the execution of decrees occasioning material irregularities may lead to vitiations of the entire processes, the same way irregularities lead to nullification of trials of suits."

Based on the above, I believe that the 1st defendant executed the order and decree of the court unlawfully, hence illegal. Once you submit yourself to the judicial process, it is only concluded once the final orders relating to the case are issued to its finality, such as execution of its demands if the eviction is not peaceful.

Given the above, the principle that an owner of a property has the right to evict a tress passer who has refused to vacate the property and that where such eviction is effected, the owner may also remove the properties and goods of the person evicted to leave the premises empty where judicial process is involved, does not apply to, until the court of law grants an order of the eviction. This is distinguishable from the decisions cited by Mr. Joshua Webiro, where there is no invocation of the court process.

I further state that although eviction procedures entailed under the law may be a considerable expense and delay, they must be strictly followed;

otherwise, the parties would not need to submit themselves to the court's jurisdiction. Again, there would be no need for laws to guide the execution of court orders.

The landlord, **Ubungo Plaza Limited,** had no right to forcibly evict the plaintiff except per the due process of the law. The first issue is answered in the affirmative.

Since the 1st issue is answered in the affirmative, the second issue is whether the Plaintiff suffered a business loss. Mr. Webiro argued that the Plaintiff has not suffered any loss. According to him, all the reliefs claimed in the plaint save for general damages are special damages to be explicitly pleaded in the pleadings and strictly proved. He submitted that the plaintiff's claims had not been specifically pleaded in the plaint as required by the law as he has not shown how she arrived at that amount, but she has blankly prayed for the same.

Likewise, Mr. Webiro refurbished the refund claim for the assets allegedly unlawfully withheld on the premises. According to him, the Plaintiff has not specifically pleaded this claim in the plaint, but she has just mentioned it. The Plaintiff has not listed the alleged assets and the value for each asset

to total TZS 1,700,000,000. Moreover, PW1, in his testimony, needed to show how that amount was arrived at. It was his submission that PW1 only relied on **Exhibit P3** Audited Financial Statement, which had all the assets owned by Plaintiff with a value of more than TZS 1,700,000,000/=. In Exhibit P3, the list and exact value of the assets that are alleged to be withheld by the 1st Defendant were not shown.

More or so, the claim amount alleged unnecessarily paid to the employee was not pleaded explicitly by the plaintiff; instead, it was only mentioned by the Plaintiff. Plaintiff did not indicate in the plaint the number of employees paid and how much each was paid to get a total of TZS 89,000,000/=.

The counsel supported his contentions in the case by the Court of Appeal in the case of **Zuberi Augustino vs. Anicet Mugabe (1992) TLR 137** on page 139, where it was stated by the court that:

> ***"It is trite law, and we need not cite any authority, that special damages must be specifically pleaded and proved."***

The counsel also referred to the case of the Court of Appeal in the case of **Masolete General Supplies vs. African Inland Church (1994) TLR 192 and stated as follows;**

> ***"Once a claim for a specific item is made, that claim must be strictly proved, else there would be no difference between a specific claim and a general one; the trial judge rightly dismissed the claim for loss of profit because it was not proved."***

In his witness statement, PW1 told the court that the 1st Defendant and his agents also evicted several guests in the hotel and forced her to refund the guests a total of Tshs. 12,800,000/-. The plaintiff also contended that four years out of the 15 years tenure of the lease agreement, the second unlawful eviction by the 1st Defendant took place, was making an average income as follows. In the year 2010 earned an income of Tshs 4,831,443,256/-; 2011 earned an income of 6,804,786,223/-, 2012 earned an income of 6,974,338,153/- 2013 earned an income of 5,607,847,130/-, 2015 earned an income of 5,419,392,034 and 2016 earned an income of 3,970,324,089/-, as can be seen at the Statement of comprehensive income

in the financial statements of the Plaintiff for the year 2010, 2011, 2012, 2013, 2015 and 2016.

The Plaintiff has a fixed income of not less than Tshs. 4,000,000,000/- per year, as stated in Clause 17, the unlawful eviction has deprived the Plaintiff of future income for the remainder of the duration of the lease agreement, which was supposed to expire in 2021. After that four years remaining in the contract and per the previous earnings, the Plaintiff had an expected forecast income of not less than Tshs 4,000,000,000/- per year; therefore, he was deprived a total of Tshs 16,000,000,000/- in total as future income expected from lease between the parties.

In addition, the 1st Defendant seized 37 rented motor vehicles at the premises at the time of the eviction. According to the plaintiff, the said motor vehicles were leased from a 3rd party, Holiday Beach Resort Company Limited, for a fee of USD 30 per day. The plaintiff produced a copy of the Rental agreement dated 10th January 2017 commencing on the 01st August 2017. Therefore, the 3rd party is claiming the rental fee of USD 30 per car for every 37 cars from the date the vehicles were seized, that is, 09 November 2017 up to date. To him, the total claim of the cars up to 31st December 2021 is a tune of USD 2,076,810, which is accruing as long as the vehicles are seized.

She added that the seized 37 car machines are only parked, and they wear and tear as time goes by as they are not maintained nor used; therefore, the 3rd party is also claiming the costs of rehabilitation and wear and tear charges.

PW1 also produced copies of cheques and acknowledgment slips from employees of the Plaintiff, whereby a total of **Tshs 89,000,000/-** has been paid as benefits and severance pay for the loss of employment due to the eviction. Together with all that, she claims damages for suffering reputational damage and business loss. She also included loss relating to the seizure of perishable food products and goods for hotel guests, hotel appliances, computers and electronics, and furniture. The Plaintiff also suffered loss by compensating and losing sub-tenants to whom he sub-leased part of the leased premises to 3rd parties, namely Fotomix production, Shuza care, Alphonse James Wambura, Martina Killian Nchia, IO Technologies, John Joseph, Aisha Mahmoud.

In his witness statement, the response of DW1 was too general. He only stated that the Plaintiff is not entitled to compensation to the extent of Tshs. 3.2 billion; 1.5 billion; 89 million and 1.5 billion or any sum thereof for the alleged or at all, as compensation for the alleged unlawful eviction from

the leased premises, nor is she entitled to costs of the suit and or any other reliefs since the evictions were lawfully conducted and in accordance to the law, more so the same has failed to prove the respective quantum, which is not only unrealistic but also misplaced in the eyes of the law.

I have reviewed both parties' evidence and submissions concerning this point. As rightly contended by Mr. Webiro, the law is settled. That special damages must be specifically pleaded and proved. See the cases of **Masolete General Supplies vs. African Inland Church Tanzania; Zuberi Augustino vs. Anicet Mugabe** and (supra); **Reliance Insurance Company(T) Ltd** and **2Others Vs Festo Mgomapayo**, Civil Appeal No.23 of 2019 (CAT-Unreported).

The plaintiff, through PW1, produced in the court exhibit PE5, which is the car hiring contract dated 10th January 2017. **First,** I believe the compensation for the loss of 37 cars seized and locked by the 1st defendant when filing the case to date is proved. Exhibit PE5 is a contract between the plaintiff and Holiday Beach Resort Company Limited t/s CALL-A-CAR showing a daily rental fee of USD 30 charged per car for each thirty-seven Cars (37) from the date the vehicle was seized to date. Throughout the pleadings and evidence adduced by DW1, nothing shows that the seizure and locking of the

cars by the 1st defendant in his premises was justifiable. There was no court order relating to the attachment of the properties in question; hence, it was attached at the defendant's peril and, therefore, illegal. Contrary to what was stated by DW1 in his evidence, the court order had nothing to do with the seizure of the properties: it was for vacant possession only. **Second,** the refund to employees Tshs. 89,000,000/= is also proved. Exhibit PE 4 shows that the plaintiff had to lay off and pay terminal benefits to the employees to the employees of the plaintiff because the eviction was unlawful. Copies of cheques and acknowledgment slip from the plaintiff's employees show payment of benefits and severance pay for the loss of employment due to eviction. **Third,** on the part of general damages. The Purpose of Damages is to put the party who has suffered due to the breach in nearly the same position that he would have had the other party not broken the contract (**restitution in integrum**).

The court, in the case of **Anthony Ngoo &Another Versus Kitinda Kimaro**, Civil Appeal No. 25 of 2014, held, among other things;

"The law is settled that the trial judge awards general damages after consideration and deliberation on evidence on record that

justifies the award. The judge has discretion in the award of general damages. However, the judge must assign reasons".

The general damages computation principles laid down in **Ward v. James** (1995) ALL.ER 563 are as under: -

"(1) The award should be moderate, just, and fair, and it should not be oppressive to the respondent;

(2) The award should not be punitive, exemplary and extravagant; and

(3) So far as possible, similar cases must be decided similarly. The community of public at large may not carry the grievance of discrimination."

In assessing the general damages, the plaintiff has shown that she earned a fixed income of not less than Tshs 4,000,000,000/= per year. According to exhibit PE-3, the plaintiff's financial report,2010-2016, indicates that her forecast earnings income was not less than 4,000,000,000/=per year. He also alleged the loss of his business in other Hotels, such as Dodoma Hotel, Beach Komba, Wild Africa Hotel, Madinna Elbahar, and Urban Hotel in Manyara, though not explicitly quantified. But for general damages, it is

relevant and can be relied on. Additionally, he claims for loss of business and reputation.

Based on the above factors and the fact that granting the general damages is the court's discretion, I hold that the plaintiff is entitled to general damages to Tshs. 1,000,000,000/=.

In the third issue, as to whether the Plaintiff to the Counterclaim is entitled to the arrears of rent and service charges to the tune of USD 1 702,507.95 from 1st April 2016 to 9th November 2017. DW 1, in his testimony, testified that in the Land Case 31 of 2016, the Plaintiff was ordered to pay rental arrears up to 31 March 2016. Mr. Webiro submitted that, Despite the presence of the respective judgment and contrary to the Lease, Plaintiff neglected and or refused to heed and pay rent for the period between **1 April 2016** and **9th November 2017,** when she was evicted.

According to the learned State Attorney, DW 1 testified further that Plaintiff's unlawful non-payment of rent to the 1st Defendant from 1st April 2016 to the date of eviction on 9th November 2017 has caused Defendant to suffer huge losses and inconveniences. He, therefore, claimed for The General damages to the tune of TZS. 4,000,000,000/= or any other sum for breach of contract, interests, costs of the suit, interest on at the commercial rate of

20% from the due date to the date of judgment in the Counter Claim. Interest on the decretal sum at the rate of 12% from the date of judgment to the date of satisfaction of the Decree Costs in the counterclaim and any other relief(s) this Honorable Court will deem just and fit to grant. , which was a total of US$ 1,702,507.95. In re-examination, DW 1 was not asked any questions about this admission. As such, this fact stands admitted and proved. On several occasions, the Court of Appeal has held that if a witness is not cross-examined or reexamined on any question the opponent asks, that fact is taken to have been admitted and proved. He referred to the case of **George Maili Kemboge. Vs. The Republic, Criminal Appeal No. 327 [Unreported]** held that failure to cross-examine a witness on a crucial matter ordinarily implies the acceptance of the truth of the witness evidence.

I have revisited the witness statement of PW1. He said nothing about the claims of the 1st defendant in the counterclaim. As rightly contended by Mr. Webiro, PW1 admitted the existence of the rent arrears. In that regard, such admission is taken as proved. In his submission, Mr. Shalom argued that Land Case No. 31 of 2016, lodged on 25th April 2016, which is the reason for the eviction awarded to the plaintiff USD 1,407,319.86 and does not provide a description of the rent, if not similar to the one claimed in this case.

According to him, Land Case No. 57 of 2018 was the rent from July 2017 to March 2018, and an exported decree of rent was issued of USD 171,539.84, and this same period of rent is claimed under the defendant counterclaim in paragraph 25.

I have perused the contested exparte judgment by E.B Luvanda J. between the parties herein dated 27th February 2019. The plaintiff was ordered to pay, among others, outstanding rent from July 2017 to 31st March 2018, USD 171,539.84. In this case, the defendants, in the counterclaim, prayed the payment of rent arrears of USD 1,702,507.95 from April 2016 to 9th November 2017. However, the rent claimed in the ex-parte judgment by E.B Luvanda J. were rent arrears for the second floor of the building rented to the plaintiff. In other words, it has nothing to do with the current claims by the 1st defendant. Therefore, the defendants are entitled to the rent arrears of **USD 1 702,507.95.**

Regarding the fourth issue, what reliefs are the parties entitled to? Mr. Webiro believed that the eviction was lawful since the Plaintiff was a trespasser in the demised premises. Hence, she cannot claim to have suffered any loss and is not entitled to compensation. Mr. Webiro cited the case of **Princess Nadia (1998) Ltd vs. Remency Shikusiry Tarimo,** Civil Appeal

No. 242 of 2018 [Unreported]. In this case, she stated that, as such, the court held that she was not entitled to any notice before the eviction. The Court, pages 11 to 12 of the Judgment, had this to say

> ***"We once again agree with the learned advocate for the respondents that since it was proved that the appellant was a trespasser, she had no right to benefit from her wrongful act. At worst, the appellant assumed the risk of her unlawful occupation on the premises. Just as she was not entitled to any notice before eviction, she had no right to claim compensation from the forceful eviction." [Emphasis supplied]."***

On the part of the counterclaim, he argued that since the counterclaim was proved by PW 1 and admitted by DW 1, the Defendants are entitled to payment of US$ 1,702,507.95 being rent withheld over the leased property which the Plaintiff unlawfully occupied from 1st April 2016 to 9th November— the General damages to the tune of TZS. 4,000,000,000/= or any other sum for breach of contract. Interest and costs of the suit. Interest on at the commercial rate of 20% from the due date to the date of judgment in the Counter Claim. Interest on the decretal sum at the rate of 12% from the date of judgment to the date of satisfaction of the Decree, Costs in the

counterclaim, and any other relief(s) this Honorable Court will deem just and fit to grant.

Mr. Shalom disagrees with Mr. Webiro. He submitted that the 1st Defendant has failed to show if the assets claimed are his or he handed over all assets belonging to Plaintiff back to his possession, hence liable to compensate Plaintiff. According to him, the act of the 1st Defendant was harmful to the Plaintiff as demonstrated in the evidence, which dramatically has not been controverted by the 1st Defendant. The fact that they insist they were executing a court decree without following the law, rules, and procedure for execution is clear evidence from DW1 that they violated the law. To him, The Plaintiff has demonstrated on the balance of probability the loss they have suffered in the entire ordeal. Hence, Plaintiff is compensated as prayed in the pleadings and substantiated in evidence to restore at least the harm caused by the 1st Defendant. He argued that it is fair; the court imposes punitive damages to deter such actions from being taken.

Plaintiff prays for the payment of compensation to a total tune of Tanzania Shillings Six Billion Four Hundred Eighty-Nine Million Only (6,489,000,000/-) for the losses suffered by the Plaintiff as a consequence of

the 1st Defendant's unlawful, unjustifiable, and unwarranted acts in particular; loss of business, reputation, and damage to the tune of Tanzania Shillings Three Billion and two hundred million (Tshs 3,200,000,000/-, Damage for wrongful eviction to the tune of Tanzania Shillings One Billion and Five Hundred Million (Tshs 1,500,000,000/-), Tanzania Shillings Eight Nine Million Only (Tshs 89,000,000/-) been unnecessarily paid to employees and the cost of the suit, and Tanzania shilling One Billion Seven Hundred Million (Tshs 1,700,0000,000) (book value) been refund for the assets unlawfully withheld by the 1st Defendant premises contrary to the law Section 100 of the Land Act.

As I have said earlier, the eviction was unlawful. That said and done, the plaintiff is entitled to both specific and general damages. In other words, the plaintiff has proved his case to the required standard, which is preponderous of probability.

Consequently, this court enters judgment in favor of the plaintiff, and it is at this moment ordered that the defendants to pay the plaintiff the following reliefs:

i. Tanzania shilling One Billion Seven Hundred Million **(TZS 1,700,0000,000)** (book value) being refund for the

assets unlawfully withheld by the 1st Defendant premises contrary to the law.

ii. General damages to Tanzania Shillings One Billion (**TZS 1,000,000,000/=).**

iii. Tanzania Shillings Eight Nine Million Only (**TZS 89, 000, 000/-)** being unnecessarily paid to employees.

iv. The 1st Defendant is to release all items belonging to the plaintiff and third parties seized and locked up by the 1st Defendant.

v. Interest on the above of 12% from the filing date to the date of judgment.

vi. Interest on the decretal amount of 9% from the date of judgment to the date of actual payment.

vii. Each party should bear its costs.

As to the counterclaim, the court enters judgment in favor of the defendants. The plaintiff/Defendant is ordered to pay the defendants/ Plaintiffs as follows: -

i. Payment of **USD 1,702,507.95** being rent withheld over the leased property, which Plaintiff unlawfully occupied from 1st April 2016 to 9th November 2017.

ii. The General damages to the tune of **TZS. 1,000,000,000/=.**

iii. Interest at the commercial rate of 20% from the due date to the date of judgment in the Counter Claim.

iv. Interest on the decretal sum at the rate of 12% from the date of judgment to the date of satisfaction of the Decree.

v. Each party should bear its costs.

Order accordingly.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY

MWANGA

JUDGE

31/08/2023

COURT: Judgement delivered in the presence of Advocate Shalom Msacky for the Plaintiff and Ms. Caroline Lyimo, learned State Attorney for the Defendants.

H. R. MWANGA

JUDGE

31/08/2023