

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**SONGEA SUB - REGISTRY**

**AT SONGEA**

**DC. CIVIL APPEAL NO. 09 OF 2023**

*(Originating from Namtumbo District Court in Civil Case No. 03 of 2021)*

**YOHANA ALBERT ..... APPELLANT**

**VERSUS**

**RAJABU HALIFA MASOGO ..... 1<sup>ST</sup> RESPONDENT**

**OMARY ABDALLAH MAPUTA ..... 2<sup>ND</sup> RESPONDENT**

**TWINS AUCTION MART CO. LTD &**

**COURT BROKER ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

Date of Last Order: 27/02/2024

Date of Judgment: 22/03/2024

**U. E. Madeha, J.**

To begin with, before the District Court of Namtumbo (the trial Court), the first Respondent filed a civil suit for the declaration that the Appellant, the second and third Respondents are liable for the tort of trespass to goods. He claimed to be paid TZS 38,040,000.00 as specific damages and TZS 10,000,000.00 as general damages from the inconveniencies, psychological and economic hardship he has suffered.

Briefly, the origin of the first Respondent's claim are as follows; the Appellant filed a civil case before Namtumbo Primary Court against the

second Respondent and he was ordered to be paid TZS 17,860,000.00. The second Respondent failed to pay that amount and the Appellant file an application for execution before the same Court and an order for attachment of the second Respondent's properties was granted. The third Respondent who is a Court Broker attached and later on sold properties which the first Respondent claimed to be his properties. This was the basis of the first Respondent's claims before the trial Court

It is important to note that, initially, the first Respondent filed an objection proceeding before Namtumbo Primary Court which was not decided in his favour. Dissatisfied with that decision he preferred to file civil suit before the District Court of Namtumbo which found the first Respondent to have proved his claims and ordered the Appellant and the third Respondent to pay the first Respondent TZS 26,980,000.00 as specific damages, TZS 5,665,800.00 as general damages and the costs of the suit. The Appellant filed this appeal challenging the finding and decision of the trial Court.

The evidence given by the parties before the trial Court are to the effect that; the first Respondent who was the Plaintiff told the trial Court that he is engaged in maize and pea crops business and he tendered the trading license which was admitted as exhibit TC1. In that regard, he

stated further that on 1<sup>st</sup> May, 2021 he rented a house from the second Respondent's family in which he used to store his crops. On 30<sup>th</sup> August, 2021, the second Respondent was surprised to find the Appellant and the third Respondent taking the first Respondent's properties claiming to be the property of the second Respondent. He testified further that one hundred and twenty (120) bags of peas and one hundred and twenty (120) bags of maize which were the properties of the first Respondent were taken.

The first Respondent told the trial Court that he never witnessed the incident of taking the properties but he was informed by the second Respondent that the Appellant and the third Respondent took those properties believing to be the properties of the second Respondent. When he met with the Appellant, he told him that the seized properties belonged to the first Respondent. Later on, he filed an objection proceeding in the execution application between the Appellant and the second Respondent which was pending before Namtumbo Primary Court.

PW3 in his testimony told the trial Court that on the material date he was at the place where the properties were stored and he witnessed the place being raided by the Police Officers who accompanied the

Appellant and the third Respondent and took the maize and peas. He added that the second Respondent was ordered to open the store and he did so under the supervision of the Police Officers and one hundred and twenty bags of maize and one hundred and thirty bags of peas were taken.

Again, the Appellant in his testimony claimed that the taken properties were the properties of the second Respondent and he was making an execution of Civil Case No. 2 of 2020 of Namtumbo Primary Court. He added that he was surprised to find the first Respondent claiming to be the owner of the properties and he filed an objection proceeding before Namtumbo Primary Court which was not decided in his favour and he preferred to file a fresh civil case before Namtumbo District Court claiming that there was tort of conversion (trespass to property) while there was a pending application for execution between the Appellant and the second Respondent.

The main controversy is who was the owner of the properties between the first Respondent and the second Respondent. While the Appellant claims that the properties belonged to the second Respondent, the second Respondent claims that they were the properties of the first Respondent. Thus, the cause of action in a civil case filed by the

Appellant was due to the execution process of Civil Case No. 2 of 2020 of Namtumbo Primary Court which was between the Appellant and the second Respondent.

The Appellant filed this appeal challenging the decision of the trial Court. In his memorandum of appeal, he has four grounds of appeal namely:

- 1. That the trial court erred in law and in fact in dismissing the Appellant's preliminary objection on a point of law to the effect that the suit before it was incompetent and bad in law for want of a mandatory written demand notice to the Appellant prior to the institution of the suit.*
- 2. That the trial court erred in law and in fact in turning down the appellant's request of producing additional documents as exhibits under Order XIII, Rule 2 of the Civil Procedure Code (Cap. 33, R. E 2019) exhibits which were initially scheduled to be tendered by the third Respondent (third defendant) and were annexed in his written statement of defence prior to his withdrawal from the case.*
- 3. That the trial court erred in law and in fact in not drawing an adverse inference against the first Respondent who had annexed the alleged lease agreement in his pleadings but failed to tender it as an exhibit in court.*
- 4. That the trial court erred in law and in fact in holding that the first Respondent had established his case to the standard required by law.*

Before this Court the Appellant was represented by Mr. Edson Mbogoro, the learned advocate and Mr. Zuberi Maulidi Singino, the learned advocate appeared for the first Respondent. The second Respondent appeared in person while the third Respondent failed to enter appearance before this Court and the trial Court.

Arguing in support of the appeal, Mr. Mbogoro averred that the trial Court erred in law and in fact, in dismissing the Appellant's preliminary objection on point of law that the suit before it was incompetent and bad in law for want of a mandatory written demand notice. He contended that, for the right of action that accrues on conversion, a demand note is mandatory as it has been emphasized by the Courts several times. To buttress his contention, he invited this Court to be guided by the decision made by the Court of Appeal in the case of **CRDB (1996) LTD vs. Boniface Chimya** (2003) TLR 413. He also referred to the decision made in the case of **Siaga Isaro vs. Marwa Magaga & Two Others** (PC. Civil Appeal No. 05 of 2020).

Mr. Mbogoro pounded that since the cause of action accrued from the tort of conversion, demand notice was very vital before the institution of a civil case. Lastly, he prayed for this ground of appeal to be allowed.

On the other hand, Mr. Zuberi Maulidi in his submission on the first ground of appeal, that the trial Court erred in law and in fact in dismissing the Appellant's preliminary objection on a point of law that the suit before it was incompetent for want of a mandatory written demand notice prior to the institution of the suit, argued that the trial Court was correct in its decision since issuing a demand notice is not a mandatory requirement of the law. He added that even the Appellant's advocate has failed to state the law which provides for the mandatory requirement of issuing a demand notice in tort of conversion. He argued further that the case of **CRDB (1996) LTD vs. Boniface Chimya** (supra) which was referred by the Appellant's counsel is distinguishable to the circumstances of the case at hand.

He contended that, the case at hand is in a form of tort of conversion known as trover, which the law does not require mandatory notice by the party suing. He added that if the first Respondent's claims would have been for the return of the properties, demand notice would have been mandatory but since in the present case the properties were already sold, there was no need of issuing the demand notice.

In his rejoinder submission, Mr. Mbogoro insisted that; for suits founded on the tort of conversion of property, a written demand notice

is mandatory before instituting a civil claim before the Court of law. He contended that the first Respondent's counsel has argued that there is no any provision of the law which provides for the mandatory requirement of issuing a demand notice before the commencement of any claim founded on the tort of conversion but it should be born in mind that the tort of conversion is not a creature of our jurisdiction; rather, it is a common law tort imported into our country through the reception clause under the *Judicature and Application of Laws Act* (Cap. 358, R. E 2002) and he prayed for this ground of appeal to be sustained.

As far as I am concerned, I have perused the trial Court original record and fid that, the claims which were preferred by the first Respondent was founded on the tort of conversion. This is a legal concept that involves the wrongful interference with another person's property rights, leading to the deprivation of right to use or possess that property. This tort can apply on both movable and immovable property.

On the issue of whether demand notice was a mandatory requirement before the institution of a civil claim founded on the tort of conversion, I am aware that those are pre litigation procedures that parties must follow. The purpose of such procedures is often to encourage parties to resolve their disputes without resorting to litigation.



Failure to follow the pre-litigation procedures might led to the consequence of the trial Court ordering the Plaintiff to go and comply with that requirement before allowing the civil proceedings to proceed. The court may pause the proceedings until these steps are completed.

In the present appeal, the first Respondent filed his claims which arose from the execution of the Primary Court's decree against the second Defendant. In my view, I find there was no need to file the demand notice. Finally, the first ground of appeal is hereby dismissed.

On the second ground of appeal, Mr. Mbogoro submitted that the trial Court erred in law when it refused to grant an order for the Appellant's leave to file and tender an additional list of documents under Order XIII Rule 2 of the *Civil Procedure Code* (Cap. 33, R. E 2019). He contended that the documents that were sought to be tendered were those that were annexed by the third Respondent in his written statement of defence who failed to enter appearance at the hearing of the case. He added that, from the nature of the suit, the Appellant and the third Respondent were supposed to give their testimonies jointly and failure of that made the trial Court to fail to administer justice properly. He went on contending that, since the documents were not in the control of the Appellant, it was a good cause for the trial Court to grant

an order for the Appellant to file a civil suit as provided under Order XIII, Rule 2 of the *Civil Procedure Code* (supra). He submitted further that the withdrawal of the third Respondent from the case was the main reason of praying to file a list of additional documents. He contended that the refusal to grant for an order to file an additional list of documents was unfair and unjustifiable since the Respondents would have not been prejudiced by that order since they were aware of them as they were annexed by the third Respondent in the written statement of defence.

On the contrary, Mr. Maulid submitted that, the law under the provision of Order XIII, Rule 2 of the *Civil Procedure Code* (Cap. 33, R. E. 2022, allows any party to file a list of additional documents. He went on arguing that a party or his advocates shall file such list of additional documents at the first hearing of the suit and not more than that but the Appellant prayed to file a list of additional documents when the Plaintiff (first Respondent) has closed his case. He contended that in doing so, there must be a good cause to enable the Court to grant leave so as to file an addition list of documents as provided under Order XIII Rule 2 of the *Civil Procedure Code* (supra).

In his rejoinder submission, Mr. Edson Mbogoro, insisted that the documents that were sought to be added were not in the possession of the Appellant when the written statement of defence was filed and even at the first hearing date and the withdrawal of the third Respondent from the case after filing his written statement of defence was a good cause and granting for any order to file a list of additional documents would not have led to miscarriage of justice nor would have prejudiced the Respondents since they knew the documents before the hearing date having been served with those documents by the third Respondent as annexures to his written statement of defence. He added that the trial Court was to consider on whether the other party would be unfairly treated or prejudiced by its admission.

So long as I am concerned, having gone through the submissions made by the parties and the original records from the trial Court and found the Appellant requested to file an additional list of documents and the trial Court refused to grant that order. I agree with the Respondent's learned counsel that the Appellant has no good cause to enable the trial Court to grant leave for the Appellant to file a list of additional documents as provided under Order XIII, Rule 2 of the *Civil Procedure Code* (supra). The law allows filing list of additional documents at the

first hearing date and not after the closure of the Plaintiff's evidence. In that regard, the second ground of appeal is dismissed.

Considering the third ground of appeal, Mr. Mbogoro submitted that the trial Court erred in law and in fact in not drawing an adverse inference against the first Respondent's failure to tender in Court the alleged lease agreement between him and the second Respondent despite annexing it in his pleadings. He argued that, among the four (04) issues framed before the trial Court at the commencement of the hearing and agreed by the parties their determination depended on the finding of the court as to whether there was a lease agreement between the first Respondent and the second Respondent's family. The first Respondent was to prove on whether there was a lease agreement with the second Respondent's family. He contended that, the first Respondent's failure to tender the lease agreement entitled the trial Court to draw an adverse inference that if it would be tendered, it would not have been in his favour. To cement his stance, he referred this Court to the decision made in the case of **Hemed Said vs. Mohamed Mbilu** (1984) TLR 113, in which it was held that where, for undisclosed reasons, if a party fails to call material witness on his side, the court is

entitled to draw an adverse inference that if such a witness were called, he would have given evidence contrary to such a party's interests.

On the contrary, Mr. Zuberi Maulidi submitted that, there is no hard and fast rule that restrains the party that annexed a document in the pleading must tender it during trial. He averred that there was no need of tendering the lease agreement since the facts of the lease agreement was well proved through the evidence given by PW1, PW2 and DW3. All these witnesses testified to the existence of the lease agreement. He expounded that the case of **Hemed Said vs. Mohamed Mbilu** (supra) is distinguishable from the case at hand since in the cited case the party failed to call a material witness, which led the Court to draw adverse inference that if the witness would have been called, he would have testified contrary to the party's interest but in the instant case the first Respondent called all the material witnesses to prove his case. He stated further that, the absence of a written lease agreement cannot invalidate the lease agreement entered between the parties and there was no justification for the trial Court to draw an adverse inference against the facts which were well proved to the required standard.

I am of the view that, in legal proceedings annexing a document in pleadings is typically a procedural principle. However, to annex and

tender such document as an exhibit in Court during trial are two different issues. A party may annex a document but find not proper to tender it at the hearing depending on the circumstances of the case. Thus, I find failure to tender an annexed exhibit does not entitle the trial Court to draw an adverse inference against the defendant. Therefore, the third ground of appeal is also unfounded and it is dismissed.

On the fourth ground of appeal, Mr. Mbogoro submitted that the trial Court erred in law and in fact in deciding the case in favour of the first Respondent's while he failed to prove his case to the required standard of proving a case on the balance of probability. He contended that, the first Respondent failure to tender the lease agreement to prove that he rented the premises in which the goods were seized and attached were his properties. He further argued that, before filing Civil Case No. 3 of 2021, which gave rise to the present appeal, the first Respondent and another person filed Civil Case No. 1 of 2021 in the same trial Court, complaining about the same incident against the same defendants alleging that the third Respondent illegally attached four hundred (400) bags of maize and peas; two hundred (200) bags of maize and two hundred (200) bags of peas valued at TZS 24,000,000.00 and such facts were proved by a copy of plaint in Civil Case No. 1 of

2021, which was admitted as exhibit "DC1." In Civil Case No. 3 of 2021, which gave rise to the present appeal, the first Respondent claimed that the third Respondent attached one hundred and twenty (120) bags of maize weighing one hundred and thirty (130) kilogrammes and one hundred and twenty (120) bags of peas and its total value was TZS. 38,040,000.00. In that regard, the inconsistencies between Civil Case No. 1 of 2021, which was later withdrawn and Civil Case No. 3 of 2021 suggest that the claim was not genuine but just fabricated facts. He added that even the fact that there was a landlord and tenant relationship between the first Respondent and the second Respondent's family was an afterthought.

He argued further that the first Respondent failed to prove his claims to the require standard and the trial Court erred both in law and in facts by deciding that the claim was proved to the require standard. Finally, he prayed for this appeal to be allowed by quashing the proceedings of the trial Court and its orders and decree be set aside with costs and he prayed for the proceeds obtained from the sale of the attached goods, which are in the custody of the District Court be handed to the Appellant, who should thereafter continue to search for the

second Respondent's property so that the remaining sum of the decree an amount of TZS 17,000,000.00 may be satisfied.

On the other side, Mr. Zuberi Maulid submitted that the first Respondent proved his claims to the standards required by law in civil cases. He averred that the evidence adduced by the first Respondent and his witnesses proved the claims to the required standards and on the number of bags attached was well resolved by the trial Court in its judgement. In the final analysis, he prayed for this appeal to be dismissed with costs.

In his short rejoinder submission, the Appellant's learned advocate, Mr. Mbogoro, insisted that the first Respondent failed to prove his claims to the standard required by the law and he prayed for this appeal to be allowed with costs.

The fourth ground of appeal raises the issue of whether the case was proved to the required standard of proving on the balance of probabilities. To prove the tort of conversion one has to prove the following elements; **First**, that the complainant has a legal right of ownership or possession of the property at the time of conversion. **Second**, the Defendant's actions must have interfered with the Plaintiff's right to possess or use the property. As a matter of fact,



interference may be from actual physical possession or other actions that wrongfully deprive the owner's rights. **Third**, that there were actual damages. The Plaintiff has to prove that there was some form of harm or loss suffered as a result of the Defendant's actions. This could include loss of use, diminution in value or any other quantifiable damages. Also, it is important for the Plaintiff to prove that there was a direct link between the Defendant's actions and the harm suffered by the Plaintiff. **Fourth**, the plaintiff has to prove that there was an intent to exercise dominion or control over the converted property or the Defendant intentionally exercised control or dominion over the property. This could include physically taking, using or disposing of the property without the owner's consent. In general, the Plaintiff is required to establish that he has legal ownership or rightful possession of the property at the time the conversion occurred.

In the instant appeal, the evidence given by the first Respondent before the trial Court is to the effect that he owned one hundred and twenty (120) bags of maize and one hundred and thirty (120) bags of peas which were stored in the house of the second Respondent's family. The first Respondent in his testimony told the trial Court that he rented a house from the second Respondent's family and there was a contract

that was between the first Respondent and his witness (PW2). The evidence shows further that the house was the property of the second Respondent's father who was already died but the administrator of the estate of the second Respondent's family was not called to testify that the house was rented to the first Respondent.

In fact, on perusal of the trial Court's records, there is no evidence to prove that the properties belonged to the first Respondent since he failed to prove his allegation that he hired a house from the family of the second Respondent. The Business License tendered by the first Respondent had nothing worth to prove that the attached properties were owned by him. Therefore, I find the executed properties were properties of the second Respondent. I hereby set aside the decision of the trial Court.

In the event, this appeal is partly allowed to the above extent. The first Respondent is ordered to pay half of the costs of the suit.

**DATED and DELIVERED** at Songea this 22<sup>nd</sup> day of March, 2024.

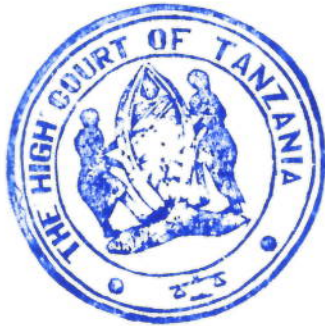


  
**U. E. MADEHA**

**JUDGE**

**22/03/2024**

**COURT:** Judgment delivered on this 22<sup>nd</sup> day of March, 2024 in the presence of the Appellant, the first and second Respondent and in the absence of the third Respondent. Right of appeal is explained.



  
**U. E. MADEHA**

**JUDGE**

**22/03/2024**

