

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

COMMERCIAL CASE NO. 72 OF 2006

FUTURE CENTURY LTD..... PLAINTIFF
VERSUS
T A N E S C O.....DEFENDANT

J U D G M E N T

Date of final submission May 23, 2007.

Date of judgment August 21, 2007.

MJASIRI, J.

This is a suit for a declaration that:

- (1) The Plaintiff is the legal owner of the electrical equipment/material/tools which are in the Defendant's unlawful possession.
- (2) An order for the release of the electrical equipment/tools/materials (in the state they were at the time they were taken from the Plaintiff's godown or the equivalent value) in favour of the Plaintiff.
- (3) Specific damages in the sum of TShs 50 million.

(4) General damages exceeding TShs 4 billion.

(5) Costs.

The Plaintiff is a limited liability company registered in Tanzania and carries various business in Tanzania including electrical engineering.

The Defendant is a public corporation whose prime duty is to supply and distribute electricity to its customers.

According to the Plaintiff, by virtue of being a reputable electrical engineering company, the Plaintiff has been awarded tenders by various institutions/companies including the Defendant for the supply of electrical materials, construction of electrical lines and other related works all over Tanzania.

It was alleged by the Plaintiff in the plaint that on July 13, 2006 the Defendant's officers without any claim of right whatsoever and in the absence of the Plaintiff's officers did phantomly, invade the Plaintiff's yard, forced the security guards to open up the door and did away with all equipments tools and materials to its premises on account that the same

were its exclusive properties and complained that the Plaintiff had stolen them.

The following issues were agreed upon by the parties:

- (1) *Whether the Plaintiff is the legal owner of the disputed electrical materials and tools.*
- (2) *Whether the Defendant is in unlawful possession of the disputed electrical materials/tools.*
- (3) *Whether the Defendant caused to be published defamatory statements against the Plaintiff.*
- (4) *If the answer to issue No.3 is in the affirmative whether the Defendant had any legal justification to publish as it did.*
- (5) *Whether Plaintiff has suffered any damages.*
- (6) *What reliefs the parties are entitled to.*

The Plaintiff was represented by Mdamu Advocate and the Defendant was represented by Johnson Advocate.

The Plaintiff called three witnesses.

PW1 Albert Albano testified as follows. He was the Managing Director of the Plaintiff. Its relationship with TANESCO was that of a client and supplier. (At one time the Plaintiff supplied Electric Poles to TANESCO). The company was also contractor and a subcontractor and also had a contractor and client relationship with TANESCO. TANESCO gave jobs to PW1 to perform and to commission back.

The company was a subcontractor when TANESCO was the main contractor. The Company is an Electrical Registered Contractor under class five (V) and it dealt with the Construction of power lines and substations and machines and electricity. Its clients were TANESCO, CELTEL and JKT and other companies.

According to PW1 the materials used by the Plaintiff in its work were poles, conductors metal structures, porcelain materials, polymeric materials transformers, cut outs and drop out fuses. The said materials had been stored in the company yard at Mikocheni. There was a yard and an office there. According to PW1 TANESCO collected tools,

equipment and material from the company yard on July 14, 2006 while he was away in Shinyanga.

PW1 learnt about it on 17th July 2006 when TANESCO announced that materials tools and equipments have been found in the company yard, and that the property was stolen from TANESCO. Everything was taken from his yard by TANESCO.

PW1 returned to Dar es Salaam on 26th July and reported to the police. He made a statement. The Police wanted a source of his materials and he showed them receipts and delivery notes and tax invoices, PW1 was given a copy of a paper where all materials were listed (Exhibit P1). According to PW1 Asia Pacific used his yard to store their materials. After the police found out that he was the legal owner, he was asked to take back his materials. Some of the materials found had TANESCO marks as they were bought from TANESCO and some were given to him by TANESCO for the works to be carried out.

According to PW1 the letter from the police dated 5th October, 2006 addressed to 'whom it may concern'(Exhibit P4) stated that the police did not establish any criminal act

on the part of PW1. The letter dated 28th December 2006 addressed to TANESCO stated that the police had investigated and had come to the conclusion that there was no act of criminality (Exhibit P4). The materials taken from the yard were legally owned by Future Century Limited and should be given back to the company.

Because of the hijacking of the company materials by TANESCO, PW1 could not complete the TPDF contract in Dodoma for the construction of Low Tension Lines for Tshs 60,743,160; the Celtel contract for Tshs 68 million, TShs 30million, TShs 28 million, TShs 20 million and TShs 43 million. The profit anticipated by him was TShs 50 million. This was 20% of the value of the contracts. According to PW1, he attempted to collect the materials on 28/1/2007 accompanied by the Police and TANESCO officials.

The materials, tools and equipment were not in the same state as they were before and some of the materials were missing and some were damaged.

The materials taken from his yard by TANESCO and the police were witnessed by TANESCO workers a neighbour and a security guard in his yard (Exhibit P6). Allegations

were made in the news papers that the materials found belonged to TANESCO, and they were stolen (Exhibit P7). This appeared in Uhuru of August 3, 2006. “Vibosile Sakata la Transfoma: Vibosile TANESCO kuwekwa Kitimoto yumo Mkurugenzi”. The article in Uhuru of July 14, 2006 referred to Albert Albano Managing Director of Future Century. It was stated that the owner of the place where TANESCO Equipments were located has not been found, “Mmiliki eneo vilimokutwa vifaa vya TANESCO hajapatikana.”

As a result of the publication. Many clients and business partners disengaged from the business such as Golden Front Trading Company of UAE, JKT, and Firex (Exhibit P8).

The company could not complete the task contracted for as its materials were hijacked by TANESCO. The company cannot also be paid for jobs not completed and can no longer get new jobs. All the company tools have been taken by TANESCO. PW1 further testified he cannot get suppliers to furnish them materials on credit and cannot repay the bank loans. The company also lost technicians, engineers, and clients.

According to PW1, before 2005 the company had revenue of TShs1.4 billion and was expecting to get TShs 4 billion by the end of 2006. However the company only made TShs 365,000,000 by the end of 2006.

The company started with TShs 16 million earnings and projected to earn TShs.4 billion. However now the company image has been tarnished in the newspapers.

On cross examination by the Counsel for Defendants PW1 stated that the police were there when the tools, equipment and materials were taken by TANESCO.

According to the article in Uhuru dated July 14, 2006 the information was obtained from the security department of TANESCO (Exhibit P7).

PW2 Matata Ntenye was an accountant at Asia Pacific Industrial Company Limited. He testified as follows. The company imported Electrical Hardware and spare parts for motor vehicles. The company normally obtained orders from TANESCO and other companies in the country.

According to PW2 the company sold cables for electricity and lining materials and transformers to the Plaintiff Company.

In 2004, 2006 the company sold transformers, cables and lining materials to the Plaintiff. The company also stored its materials at the Plaintiff's company godown.

Pw2 further testified that some goods meant for TANESCO had special marks. However the excess materials were sold to other companies. The company could sell items with TANESCO marks. According to PW2 they had a mandate to do so as the materials belonged to the company.

According to PW2, in 2006 the company ordered cables for TANESCO. TANESCO rejected the said cables because the materials were coming from a country outside the authorized group of countries required by the ADB Bank, the financier.

The Company requested future century to store materials worth over billions of shillings.

On cross Examination PW2 stated that on 14th September 2006 the goods were already supplied to Plaintiff. There was no proof evidencing payment and receipt of goods by Plaintiff. The company was not in a position to say which goods had TANESCO marks and which hadn't. The company made no statement to the police that it was storing its materials and equipment at the Plaintiff's godown.

The company had not discussed with anyone from TANESCO about goods stored at the Plaintiff's yard.

PW2 further stated that the modality of trade was that TANESCO advertised and the company made an offer (tendered). There was no proof that there was a tender with TANESCO and goods supplied were refused.

According to PW2 the company supplied transformers to Future Century (Plaintiff) and TANESCO. The transformers can only be identified through the number plates. The company Asia Pacific sold some transformers without number plates and it was also supplied with some transformers without number plates. The transformers had a serial number. The company had never gone to TANESCO to ask for materials stored at the Plaintiff's yard.

PW3 Crescence Venance Kwembe, a Sales Engineer with ABB Dar es Salaam testified as follows:

The Plaintiff Company was one of their clients. In October 2005 the Plaintiff purchased 3 transformers worth around 26 million. The Plaintiff paid 17 million in advance (Exhibit P3). There is a balance of 8.9 million. The Company has been reminding the Plaintiff about the payment.

On cross examination, PW3 stated that the delivery note was showing a list of items, the transformers were not shown in the said list. PW3 further stated that the delivery note in respect of the receipt from ABB was not available. According to PW3 the company ABB did not sell transformers without number plates. The transformers sold to Plaintiff were from Arusha. The transformers are recognized by a number plate. ABB tannery is a manufacturing firm in Arusha and the Dar es Salaam office was the sales office. TANESCO was a major customer, and it purchased transformers from the company.

The Defendant called 3 witnesses.

DW1 Selemani Mgwira was the Principal Security Officer of TANESCO. He was an electrical engineer by profession. His

duties were prevention of theft of TANESCO property; investigation of theft of TANESCO property and dealing with any other infringement of TANESCO Rules.

The company's source of information was anonymous letters and telephone calls from citizens. On 13/7/2006 he received an anonymous call that a godown in Mikocheni was being used to keep equipment and materials stolen from TANESCO. He went there with Henry Shilanga and a Police Detective Ignas Mollel. Upon arrival they found a security guard at the godown, the owner was absent. He looked at the materials and equipment and found a lot of materials had TANESCO marks, this led to suspicion. Two (2) transformers found had no number plates and were covered. This also led to further suspicion. When his colleagues verified with ABB they were informed that the transformers were sold to TANESCO and one to ABB.

DW1 made handwritten notes at the yard (Exhibit D1). DW1 was informed that the transformer sold to ABB was sold to the Plaintiff Company. According to DW1 ownership of transformers without a number plate was unknown.

DW1 called the yard owner and told him about the TANESCO items found at his yard. DW1 was asked by the owner to await his return to Dar es Salaam. DW1 reported the matter to the police. The police asked TANESCO to guard the yard. The items found at the yard were listed. DW1 stated that documents were brought to his office on 14/7/2006, as proof of ownership of the materials found in the Plaintiff's yard.

The items listed in the document brought on 14/7/2006 by the Plaintiff Company to TANESCO included delivery notes from ABB, Dar es Salaam branch showing that Future Century collected 3 transformers.

Only one of the transformers was found at the yard, the one with the serial number T24266. The other transformers shown in the delivery note were not found at the yard. (Exhibit D2). With regards to the tax invoice from Asia Pacific; DW1 testified as follows:

1. the list on the tax invoice differed with the list prepared by TANESCO at the yard.
2. many items at the yard were not accounted for. In order for items to be prepared for TANESCO, TANESCO had to provide specifications. TANESCO had never given

any specification to ASIA PACIFIC to prepare items for them. The document from Asia Pacific was just a tax invoice and not a delivery note (Exhibit P2) Tanzania Cable is the only company in Tanzania with a TANESCO contract for production of items.

After investigations, DW1 was satisfied that there were suspicious circumstances of the ownership of the items found at the Mikocheni yard. He therefore notified the police. The police asked TANESCO to store the items. According to DW1 TANESCO was facing large problems of theft of materials and equipment. Some of their storekeepers had deficit of items found at the Plaintiff's Mikocheni yard, they were suspended. DW1 wrote to ABB on the transformers found at the yard ABB replied in writing that the transformers No.T13820 and T23877 were sold to TANESCO. (Exhibit D3). DW1 further stated that he came to know of the company (Plaintiff) on 14/7/2006. He discovered that this was one of the companies short listed by TANESCO to be given tasks.

According to DW1 TANESCO sold materials to the Plaintiff Company in Dodoma. The items sold were fewer than those used by the company.(Exhibit D4). The items

with TANESCO marks found at the Plaintiff's yard were valued at TShs 25 million (Exh.D5). DW1 further testified that he had not seen the letter originating from the police addressed to 'whom it may concern' (Exhibit P4).

The said letter was responded to by the Chief Investigation Officer on 28/12/2006(Exhibit D6). TANESCO expressed dissatisfaction and asked the police to open up the transformers without the number plates for investigation. There was also a need for the equipments and materials to be identified item by item by both TANESCO and the Plaintiff. The evidence of the storekeeper was also required.

The response received from the OC CID Kinondoni dated 23.1.2007. (Exhibit D7) indicated that the matter was still under investigation. The Plaintiff refused to cooperate and PW1 wanted to collect the materials.

TANESCO therefore wrote to the police complaining of lack of cooperation on the Plaintiff's side.(Exhibit D8). According to DW1 the investigation was never done and the matter was now with the police. On 11/4/2007 TANESCO received a letter from the police (exhibit D9).

On 13/7/2006 while DW1 was at the yard someone called him and identified himself as a reporter from Uhuru and Mzalendo and asked him whether they found stolen materials at the Plaintiff's godown at Mikocheni. He responded that he found items with TANESCO marks but it had not yet been established that they were stolen. According to DW1 the case has been prematurely brought in court.

On cross examination DW1 testified that the materials and equipments were in the hands of the police. Tanzania Cable is Tanzania Daiseng Ltd. DW1 further stated that he had never seen any document from TANESCO to Asia Pacific ordering materials with TANESCO specifications. Investigations on materials were conducted in Dodoma, Oljoro and Kahama. According to DW1 what appeared in Uhuru newspaper dated 14th July 2006 (Exhibit P7) is not what he had told the reporter.

DW2 Joseph Niboye an employee of TANESCO testified as follows: He worked as a technical inspector under the Internal Audit Department. His duty was to see compliance i.e that work is done in accordance with the standards required, and that the materials used were in accordance with specifications. In conducting inspection he discovered

that 29 transformers were requisitioned from TANESCO sites but it was not known where they were. (Exhibit D10). DW2 stated that his job was to see what came out of the godown is what was utilized in the works.

DW3 Matilda Oriyo was the Principal Stock Verifier of the Defendant. According to her testimony she was required to inspect materials from the time of purchase, usage and storage. It was the officers who worked under her who conducted the inspection. According to DW3 there were a lot of deficits at the Kinondoni Store. According to the Stock Sheet the deficits were worth millions of shillings. The problem with the stores was that the supplies officer did not properly record and monitor stock and as a result there was a loss of materials. DW3 reviewed stock sheets and handed over the report to the Director of Internal audit who reported to management.

The stock sheets covered November 2005 to October 2006. According to her, the supplies officers were negligent. They did not know where the material was gone.

Both Counsels filed written submissions in support of their cases.

In his submissions on Issue No.1 Counsel for the Plaintiff relied on Exhibit P2, and P3. Counsel also relied on Exhibit P1 item 19 and Exhibit P4. Counsel asked the court to disregard the evidence of DW1. Counsel also submitted that the Evidence of DW2 and DW3 had nothing to do with the ownership of the goods. Counsel for the Plaintiff also submitted that the investigation was complete (Exhibit P4).

With regards to Issue No.2 Counsel for the Plaintiff submitted that the Plaintiff's materials were unlawfully held (Exhibit P4). Therefore Defendant's possession of the materials was unlawful.

In relation to Issue No.3 counsel for the Plaintiff submitted that the articles in Uhuru of 13th, 14th July and 3rd August, 2006 (Exhibit P7) were defamatory.

According to Counsel for the Plaintiff, DW1 was the source of information. Counsel cited the definition given in Mehrotra's Law of Defamation and Malicious Prosecution Civil and Criminal, 4th Edition 2001 Delhi House. Defamation was defined as under:

“Defamation is the publication of a statement which tends to lower in the estimation of right thinking members of the society generally; or which tends to make them shun or avoid that person.”

The publication had the effect of disparaging the plaintiff on its reputation as a professional electrical contractor.

In relation to issue No.4 Counsel for the Plaintiff submitted that there was no legal justification in the publication.

In relation to issue No.5 as to whether the Plaintiff has suffered any damages Counsel for the Plaintiff submitted that the Plaintiff suffered a loss of income of TShs 50 million (Exhibit P5) and that the Plaintiff had a projected income of over TShs 4 billion. (Exhibit P9). The Plaintiff therefore suffered general damages in excess of TShs 4 billion.

Counsel for the Defendant strongly argued against the Plaintiff's claim. In relation to Issue No.1 on ownership of the materials, Counsel for the Defendant submitted that the Plaintiff failed to prove the ownership of materials. Counsel relied on the evidence of DW1.

Counsel further submitted that the goods described in Exhibits P2 and P3 were not the same goods found in the Plaintiff's yard and listed in Exhibit P1. PW2 in his evidence failed to establish that the tender for the supply of goods to the Defendant was cancelled, and that the said goods were sold to the Plaintiff. Counsel further stated that with regards to the transformers found at the Plaintiff's yard ownership could not be established in view of the absence of number plates.

In relation to issue No.2, whether the Defendants possession of the goods was lawful, Counsel submitted that the materials/tools and equipments found at the Defendant's yard were stored in the Defendants yard on the request of the police. The goods were therefore lawfully possessed by the Defendant.

With regards to issue No.3 as to whether the Defendant published defamatory statements against the defendants. Counsel submitted that what was published in the papers reflected the actual situation and the investigation of the alleged theft was in the hands of the police. The publishers were not joined as parties and it can be said that the Defendants did not publish anything against the defendant,

any information revealed by the Defendant reflected the actual situation.

On Issue No.4, the legal justification for publication Counsel for the Defendant submitted that the publishers were not made a party to the suit and in the alternative even if the Defendant is responsible for publication the publication was justifiable as the contents revealed the actual state of things.

With regards to Issue No.5 as to whether the Plaintiff suffered any loss, counsel submitted that the Plaintiff did not suffer loss and if it did, it contributed 99% to the loss.

In relation to the relief claimed Counsel submitted that the Plaintiff is not entitled to the prayer as the matter was still in the hands of the police therefore the goods cannot be released.

After carefully reviewing the evidence on record I would like to state as under:

In relation to issue No.1, whether the Plaintiff is the legal owner of the disputed electrical materials, tools and equipments it is my finding that ownership of the said tools,

materials and equipments by the Plaintiff has not been established on the balance of probability.

The evidence on record does not clearly establish which materials were bought from TANESCO and which materials were bought from other suppliers.

The Plaintiff did not come out clearly as to the origin of the materials.

Based on evidence on record the issue of materials was still under investigation by the police Exhibit D7 & D9. The court is not in a position to conclude that the materials used belonged to the Plaintiff. Section 110, 111, 112 and 115 of the Evidence Act Cap.6 [R.E.2002] provides as under:

Section 110 (1) and (2)

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist, when a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.”

Section 111 provides as follows:

“The burden of proof in as suit proceedings lies on that person who would fail if no evidence at all were given at all on either side”

“Section 112 provides as follows:

“The burden of proof as to any particular fact lies on that person who wishes the court to believe its existence unless it is provided by any law that the proof of that fact shall lie on any particular person.”

Section 115 provides as under:

In civil proceedings when any fact is especially within the knowledge of any person the burden of proving the fact is upon him.”

The evidence of PW1, DW1 and what is indicated in Exhibit P1 and P2 relevant.

From the evidence adduced in court it has not been clearly established as to what materials equipment and tools belonged to the Plaintiff or the Defendant. The matter is still a subject of an investigation (Exhibits D7 & D9).

In relation to issue No.2 as to whether the Defendant is in unlawful possession of the disputed electrical materials/tools and equipment the answer to this issue is in the negative. In view of the evidence of DW1 that materials/tools and equipment were seized from the Plaintiff's godown and sent to the TANESCO yards with the sanction of the police. PW1 in his evidence did not dispute that and no evidence was brought forth to establish that there was a police order authorising the return of the seized equipment, materials and tools to the Plaintiff.

According to the evidence of DW1, the matter was still under investigation and that though the materials, tools and equipment were placed in the Defendant's godown, the said materials, tools and equipment were kept under the police order. The storage of the said materials was taking place at the TANESCO godown simply because the police had no storage facility. Exhibit P4 has to be read with Exhibits D7 and D9. According to Exhibits D7 & D9 the matter is still in the hands of the police and has not been concluded.

Therefore under the prevailing circumstances it would not be proper to conclude that the defendant is in unlawful possession of the materials tools and equipment.

With regards to issue No.3, whether the Defendant caused to be published defamatory statements against the Plaintiff.

There is no evidence establishing that the Defendant caused to be published defamatory statements against the Plaintiff. The publisher of Uhuru and Mzalendo newspapers was not made a party to the proceedings.

In view of what had transpired and the evidence adduced in court, the evidence of DW1, DW2, DW3 and PW1 the court cannot reach a firm conclusion that the Defendant published defamatory statements.

In order for the act of defamation to be established the following factors have to be present. Winfield and Jolowicz on Tort (9th Edition):

1. The words must be defamatory.
2. They must refer to the Plaintiff.
3. They must be maliciously published.

According to Winfield and Jolowicz (*supra*) defamation is defined as follows:

“Defamation is the publication of a statement which tends to lower a person in the estimation of right thinking members of society generally; or which tends to make them shun or avoid that person.”

In the light of the events which transpired, from the evidence of DW1 the information which was given to the Defendant on the theft of materials and the lead as to where the said materials could be found, led to the saga involving the Plaintiff and the report in the newspapers. In view of the evidence of DW1, Dw2 and DW3 materials and equipment were stolen from the Defendant. Police were involved and the matter was still under investigation. The publication in the papers reflected the sequence of events.

The Defendant was not a publisher of the newspapers and the publishers were not made a party to the suit.

Issue No.4 seeks to establish whether the Defendant had justification to publish what it did. The publishers of the newspapers were not made a party. However given the circumstances and the alert/information given to TANESCO as to where its materials and equipment could be found, the involvement of the police and the pending investigation would give justification. Issue No 3 and 4 cannot be

determined independently. The dependent variables are issues one and two which have been answered negatively.

In relation to Issue No.5 as to whether the Plaintiff suffered any loss damages. I would like to state as under:

The Plaintiff has asked for both general damages exceeding TShs 4 billion and special damages of Shs 50 million.

With regards to special damages the legal position is clear. Special damages must be proved and specifically pleaded.

In the case of **Zuberi Augustino V Anicet Mugabe** 1992 TLR 137; and **Cooper Motors Corporation (T) Limited V Arusha Int. Conference Centre** TLR 165 it was held that special damages must be specifically pleaded and proved. No documentary proof has been made available in support of the Plaintiff's claim for special damages.

With regards to the general damages these are assessed by the court and the quantum cannot be specified by the party. The award of the general damages is tied up to the outcome of the case.

In the light of what I had ruled on the preceding Issues, it is my finding that the court is not in a position to award damages to the Plaintiff. The loss and damages suffered must be attributed to the fault of the Defendant and this conclusion cannot be firmly made in the light of the evidence on record.

In relation to issue No.6 on the reliefs the parties are entitled to, I would like to make the following observations. In view of my finding on the issues set out hereinabove the Plaintiff's case is dismissed with costs. It is so ordered.

Sauda Mjasiri
Judge
August 21, 2007

Delivered in Chambers this 21st day of August 2007 in the presence of Mr. Johnson Counsel for the Defendant and in the absence of Mr. Mdamu, Counsel for the Plaintiff

Sauda Mjasiri
Judge
August 21, 2007

5,780 words

I Certify that this is a true and correct
copy of the Judgment and Ruling
Sign _____
Registrar Commercial Court, Dsm.
Date 21/9/07