

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
LAND CASE NO. 190 OF 2021**

SAID NASSOR SAID..... PLAINTIFF

VERSUS

EMMANUEL GITIGAN GHERABASTERDEFENDANT

**JUDGMENT
(ON A COUNTERCLAIM)**

Date of last Order: 18/10/2022

Date of Judgment: 28/10/2022

A. MSAFIRI, J.

The present suit was heard ex-parte on a counterclaim. The brief background of the suit is that one Emmanuel Gitigan Gherabaster (then the plaintiff) instituted Land Case No. 190 of 2021 against CRDB Bank (then the 1st defendant), Bani Investment Auction Mart, (then the 2nd defendant) and Said Nassor Said (then the 3rd defendant). The suit was filed in this Court on 08th November 2021. Emmanuel Gitigan Gherabaster claims against the three defendants jointly and severally was that they have cooperated to deprive him the ownership of the two mortgaged properties, Residential Plot

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No. 245 Block I, Title No. 46915, LO No. 164 027 and Plot No. 243 Block I, Title No. 46915, LO No. 164022 both situated at Temeke Municipality, Dar es Salaam. (herein referred as suit premises). That the defendants have deprived the said plaintiff (in the main suit), his suit premises by way of illegal auction which was conducted on 19/9/2013 which was conducted by the 2nd defendant under instructions of the 1st defendant. The suit premises were bought by the 3rd defendant who emerged the highest bidder.

Upon being served with the Plaint, the 1st and 3rd defendants filed their written statements of defence upon which they both raised preliminary objections on point of law. The 3rd defendant also raised a counterclaim.

The 2nd defendant never appeared in Court nor filed her written statement of defence despite being properly served. Hence the matter proceeded in her absence.

On 25/3/2022, Mr. Kassim Nyangarika, the counsel for Emmanuel Gitighan Gherabaster who was the plaintiff in the main suit, submitted before the Court and prayed to withdraw the main suit under provisions of Order XXIII Rule (1) and Section 95 of the Civil Procedure Code, Cap 33 (the CPC). Mr. Mlyambebele Ng'weli, representing the 3rd defendant, vehemently

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objected the withdrawal prayer, pointing that, since there are preliminary objections raised by the defendants, the law and practice dictates that the same should be disposed of first before any other prayers or orders.

On 08/4/2022, the Court made a Ruling on Mr. Nyangarika's withdrawal prayers and struck out the main suit with costs.

Having struck out the main case, the Court directed the counsel for the 3rd defendant to address the Court on the counterclaim case where the 3rd defendant was now a plaintiff. Mr. Ng'weli pointed to the Court that, they have filed the counterclaim in Court on 30/11/2021 along with their written statement of defence. He told the Court that the plaintiff (now the defendant) has never served them with a reply to counter claim (written statement of defence).

This fact was confirmed by Mr. Nyangarika for the plaintiff who stated that, he was unaware that there was a counter claim. However, the Court found that Mr. Nyangarika has advanced no sufficient grounds for the extension of time to file their written statement of defence in a counterclaim since it was proved and was admitted by Mr. Nyangarika that the counterclaim was duly served on time to his client, the plaintiff. The Court

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then made an order under Order VIII Rule 14 of the CPC for the counterclaim to proceed ex-parte. Hence after multiple applications by the plaintiff in the main suit, which were all dismissed, the present suit was set to be heard on counterclaim, ex-parte. The plaintiff being Said Nassor Said and the defendant being Emmanuel Gitighan Gherabaster.

Before the commencement of the hearing, three issues were framed by the plaintiff (who was a 3rd defendant in the main suit which was struck out).

The three issues were;

1. Whether the plaintiff is the lawful owner of the suit properties.
2. Whether the plaintiff is entitled to the payment of land rents being costs that he incurred following the defendant's failure to give vacant possession of the suit properties.
3. To what reliefs are parties entitled to.

In the counter claim, the plaintiff's claims were that, on 19/10/2013, on a public auction conducted by Bani Investment Auction Mart on behalf of CRDB Bank, he purchased two landed properties (suit properties), with intention of securing a residential premises for him and his entire family.

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That, after purchase, when the plaintiff wanted to enter possession of the suit premises, the defendant refused to give vacant possession and he has not vacated the suit premises until now. That, the act of the defendant of refusing to vacate the suit properties has forced the plaintiff to unwillingly rent a house for his residential purpose and that has caused him to suffer and continues to suffer unnecessary loss and damages. He prayed for multiple reliefs among them being the declaratory order that he, the plaintiff is the lawful owner of the suit properties.

During the trial, the plaintiff testified as PW1. Led by his advocate, he told the Court that on 14/9/2013 he saw an advertisement in a newspaper advertising an auction where the suit properties were to be sold. That, he went to see the properties and also went at CRDB Lumumba Branch where he confirmed that indeed the properties were being sold by public auction to be conducted by Bani Investment Auction Mart.

He said further that on 19/9/2013 it was an auction day, he attended with other many people and the auction was conducted. That, he emerged the winner and bought the two suit properties at a purchasing price of Tshs. 202,000,000/=.

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He said that, he first paid 25% of the purchase price on the very date of auction which was Tshs. 50,500,000/=. And he paid the remaining balance of Tshs. 151,500,000/= on 26/9/2013. He produced the payment slips which were admitted collectively as Exhibit P1.

After that, he was issued with a certificate of sale, Certificates of Title, and transfer documents which he tendered and were admitted in Court as Exhibit P2 collectively.

PW1 told the Court further that, after the process of transferring the ownership of the suit premises was complete, the current owner of the suit premises was him, Said Nassor Said.

He said that, after that, he wanted to move into the suit premises but the defendant refused to give vacant possession saying that the Bank had no mandate to sell the suit premises.

PW1 said further that the purpose of buying suit premises was for him to live there with his family and end his life of tenancy. However, after the defendant had refused to give vacant possession, PW1 was forced to rent another house at Mikocheni where he lives with his family and that the house is owned by one Mwanahamis Ramadhani Omari. He said that the tenancy

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rent per month is Tshs. 2 million, and Tshs. 24 million per year. That PW1 started to rent the house at Mikocheni since 2013. He tendered a lease agreement "Mkataba wa Upangaji" which was admitted as Exhibit P3. PW1 said that, he has incurred expenses of renting a house since 2013 until to date, which total a rent payment of TShs. 212 million.

He stated further that if the defendant could not have refused to give vacant possession of the suit premises, he could not have incurred such expenses; so, he prayed that those rent expenses should be paid by the defendant.

PW1 tendered an Eviction Notice he had issued to the defendant and it was admitted as Exhibit P4. He also produced Nipashe Newspaper dated 14/9/2013 which was admitted as exhibit P5 and a Certificate of Sale which was admitted as exhibit P6. He prayed for the Court to grant him the reliefs as prayed. The plaintiff then closed his case.

Having gone through the evidence presented, oral and documentary, I will now determine the agreed issues, the first being whether the plaintiff is the lawful owner of the suit properties. In his evidence, the plaintiff stated that he bought the suit properties at an auction. That he was told by the

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Bank that, the suit properties were mortgaged for a loan, and a borrower has defaulted in loan repayment and that is why the suit premises were being sold by public auction.

He tendered exhibit P5 which is a newspaper (Mwananchi Newspaper), where a public auction was advertised. Exhibit P5 shows clear that the suit properties C.T NO. 46915 Plot No. 243 L.O No. 164022, and CT No. 46914 plot No. 245 L.O No. 164027 Block T at Mjimwema Street, Temeke were to be sold by public auction.

He also tendered Exhibit P1, the Bank payment slips which shows that purchasing price for the suit premises was paid by Mr. Said Nassor Said, (the plaintiff).

I have also seen Exhibit P6 which is a certificate of sale, which declares the plaintiff as the highest bidder and purchaser of Plots No: 243 and 245 (suit premises).

Exhibit P2 was admitted collectively as two Certificates of Occupancy of the suit premises in the name of Emmanuel Bwabwa Gitigan Gherabaster and Transfer under Power of Sale which transfer the ownership of the suit premises to the plaintiff.

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Basing on the evidence adduced by the plaintiff, I am satisfied that he has succeeded to establish and prove that he successfully bought the two suit premises in the public auction, he is in the possession of the two Certificates of Occupancy on the two suit premises which was granted to him after he successfully bought the same, and the ownership of suit premises was transferred to him under power of sale of mortgaged land provided under section 133 of the Land Act, Cap 133.

The major question is whether by this evidence, the plaintiff can claim ownership of the suit premises. It is my finding that, by this evidence, the plaintiff is the lawful owner of the suit premises.

I say so because, it is clear that the suit premises was bought by the plaintiff, and under power of sale, the ownership of the suit premises was transferred to him. In the circumstances, the plaintiff is a bonafide purchaser and his rights over the suit premises is legally protected under section 135 (1) – (3) of the Land Act. Hence the first issue is answered in affirmative.

The second issue is whether the plaintiff is entitled to the payment of house rents being costs that he has incurred following the defendant's failure to give vacant possession of the suit properties.

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The plaintiff has pleaded in a counterclaim that, having bought the suit premises, he wanted to enter possession of the same but the defendant refused to vacate the premises, and use violence means to stop the plaintiff from taking possession of the said suit premises.

The plaintiff, testifying as PW1, told the Court that, the act of the defendant to refuse to vacate the suit premises, caused him (plaintiff) to unwillingly rent a house for residential purpose, hence incurring unreasonable and unexpected costs and expenses.

He said further that the rental costs for each month is Tshs. 2,000,000/= per each month since 01/10/2013 until the present time. He said that the total costs since 2013 is TShs. 212,000,000/=. He stated that, the costs he incurred were caused by the act of defendant to refuse to vacate his lawful owned suit premises hence forcing him to rent another house for living. He tendered a rent agreement, Exhibit P3.

The agreement Exhibit P3 shows that the plaintiff leased a house owned by one Mwanahamis Ramadhani Omari, for a period of one year i.e. from 1/10/2013 to 10/10/2014 at a monthly rent of Tshs. 2,000,000/=. The agreement shows that, it can be renewable at the wish of the tenant. *Alle*

As per this evidence, the plaintiff is praying for specific damages where he believes that he has incurred unnecessary costs due to the defendant's actions. He believes that, he was forced to rent another residential house for him and his family after the defendant has refused to give vacant possession of the suit premises.

It is trite law, that, specific damages once pleaded, must be proved. This has been pronounced in plethora of decisions of this Court and the Court of Appeal. In the Court of Appeal case of **Zuberi Augustino vs. Anicent Mugabe** (1992) TLR 137 it was held that, it is trite law that special damages must be specifically pleaded and proved.

This principle was reiterated in the case of **Solvochem Holland B.V vs. Chan Quing International Investment Co. Ltd**, Commercial Case No. 63 of 2020, HC. DSM (Unreported) where Hon. Nangela, J, quoting the Case of **Zuberi Augustino vs. Anicet Mugabe, (supra)**, emphasized that;

"a claim for specific or special damages must not only be pleaded but also its particulars must be specifically stated and strictly proved". *(emphasis mine).*

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In the present matter, the plaintiff has pleaded and proved that he has incurred expenses of paying for rent of a residential house to live in with his family after the defendant refused to give vacant possession of the houses he has bought for residential purpose. The plaintiff has maintained that it was the acts of the defendant which has forced him to seek for another place to live with his family.

I agree with the plaintiff's claims that the defendant's refusal to give vacant possession of the suit premises forced the plaintiff to live a tenancy life where he incurred expenses of rent payments. So, the plaintiff has managed to plead and prove the specific damages as per the requirement of the law.

However, it is my finding that the plaintiff has succeeded to prove that he rented a house for residential purpose for one year only i.e. from 01/10/2013 to 10/10/2014 as per the rent agreement Exhibit P3. The plaintiff did not establish whether after one year he continued to rent that house or not. Exhibit P3 shows that it was one year agreement which is renewable at the tenant's wish. It is not shown whether the tenant (plaintiff), renewed the tenancy agreement after one year. So, the plaintiff has not proved that he has rented the house consecutively since 2013 until now as he claims.

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I find that the plaintiff is entitled to specific damages mounting to one year house rent payments i.e. Tshs. 24,000,000/= only.

The third issue and last issue is to what reliefs are the parties entitled to. Briefly, the plaintiff is praying for the following reliefs;

A declaration that the plaintiff is the owner of suit premises, the defendant is a trespasser, claim of specific damages as costs for renting an alternative residential premises, permanent injunction on the defendant, payment of general damages for the hardship and disturbance caused by the defendant's refusal to vacate the suit premises, costs of the suit and any other reliefs as this Court will deem fit to grant.

Basing on the evidence and my findings that the plaintiff is the lawful owner of the suit premises, I also find that he is entitled to the reliefs claimed as I hereby order;

1. The plaintiff is declared the lawful owner of the suit properties registered as Certificate of Title No. 46914, Plot No. 245, Block I, LO No. 164077 and Certificate of Title No. 46915, Plot No. 243 Block I, LO No. 1640022, both located in Temeke Municipality, Dar es Salaam, Tanzania.

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2. The defendant is declared a trespasser and ordered to vacate the suit properties immediately on the date of delivery of this judgment and Decree.
3. A permanent restraint order is hereby entered against the defendant, his subordinates and workmen from trespassing into the suit properties.
4. The defendant to pay the plaintiff a total of Tshs. 24,000,000/= (Twenty Four Million only) being specific damages mounting to one year house rent payments i.e. from 2013 and 2014.
5. The defendant to pay general damages of TShs. 50,000,000/= (Fifty Million only), to the plaintiff for the hardship and disturbance caused by the defendant's refusal to vacate the suit premises since 2013 until todate.
6. The costs of this suit shall be borne by the defendant.

It is so ordered. Right of appeal is explained accordingly.





A. MSAFIRI
JUDGE
18/10/2022