IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB-REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 192 OF 2022

(Being an appeal from judgment and decree of District Court of Kinondoni Hon. A. M LYAMUYA, PRM dated 07th November 2022 in Civil Case No. 147 of 2021 in the District Court of Rufiji)

EVARIST NAKWAMBELA MAEMBE ..... APPELLANT

VERSUS

NAKOMBE JUMBE RAJAB ..... RESPONDENT

JUDGMENT

29th February, 2024 & 28th March, 2024

MWANGA, J.

This appeal has its origin in Civil Case No. 147 of 2022 from the District Court of Kinondoni at Kinondoni where the respondent filed a suit in respect of destruction and loss of properties in the tune of Tshs. 60,927,000/=.

The facts giving rise to this appeal are that the appellant owns a plot of land No. 4, block C at Sinza-Kijiweni in Dar es Salaam. He had earlier leased the said part of the land to Puma Energies (T) Ltd for 20 years for petrol station construction. Later he renewed the same for 10 good years. In the year 2017, Puma Energies (T) Ltd noticed that the

respondent and others had tressed to the leased land and doing business at the place. The appellant said the respondent mounted his container where he opened the business of welding workshops and video shows. The respondent on the other hand said he was conducting sewing seat covers for cars, motorcycles, and carpentry.

Be it as may be, Puma Energies (T) Ltd being a lessee issued 14 days' notice through his agent Remia Auction Mart, and removed 53 shops from the premises. The respondent and his neighbor resisted. It followed that, after six months, on the night, the broker, Remia Auction Mart through the directives of Puma Energy (T) Ltd removed the respondent and his neighbor, an act which fueled the present dispute.

During the trial, the respondent brought three witnesses to prove his case. The testimonies for his case are based on the fact that; his shipping container was placed on the road reserve and not the appellant's land. So, he was unlawfully removed. He said, the District Commissioner appointed a team that visited the Loqus in quo and concluded as such. However, before the trial court, no evidence from the said team or report to that effect was tendered to substantiate the claims. Another contention is that it is the appellant who removed him from the premises without justification, so he has to bear the duty to

compensate him. More or so, he did not receive the eviction notice as contemplated by Puma Energies (T) Limited. Also, he had his shipping container and properties removed by the appellant.

The appellant, on the other hand, entered his defense and produced two witnesses at the trial court. His defense relied on four exhibits; exhibits D1, D2, D3, and D4 to defend his case. Exhibit DE3 is a notice in which the respondent was given to vacate the premises and it was issued by Puma Energy (T) Limited. Exhibit DE1 is the lease Agreement that he had entered with Puma Energy (T) Limited, and thus makes him not responsible for the removal of the respondent.

After the trial court analysis, it was found that the agent, Remia Auction Mart removed the respondent under the instructions of the appellant. Despite such findings, the appellant was ordered to pay Tshs. 20,000,000/= as general damages. However, the trial court denied the prayer for specific damages of Tshs. 60,927,000/= for want of proof to the required standard because no evidence was shown of the purchase price of the properties.

The appellant was aggrieved with the above decision. Therefore, he appealed to this court on six grounds, namely: -

1. That the learned trial Magistrate erred in law and fact by deciding the land matter of which the court lacks jurisdiction to entertain the same;
2. That the learned trial Magistrate erred in law and fact by holding that Defendant was responsible for the removal of Plaintiff's shipping container whilst the same was not proven by Plaintiff.
3. That the learned trial Magistrate erred in law and fact by disregarding Exhibit DE3 that was tendered by DW2 taking into account that it was not controverted by the Plaintiff.
4. That the learned trial Magistrate erred in law and fact by holding that, the Plaintiff was correct in suing the Defendant and not PUMA ENERGY.
5. That the learned trial Magistrate erred in law and fact by holding that, the removal of the Plaintiff and other persons from the Defendant's property was illegal.
6. That the learned trial Magistrate erred in law and fact by holding that the Plaintiff is entitled to the payment of 20,000,000/= without any justification considering that no evidence was adduced by the Plaintiff to justify the claim.

During the hearing of this appeal, the appellant enjoyed legal representation from Mr. George Kawemba Mwiga, the learned counsel. On the other hand, the respondent was represented by Frank Killian, also the learned counsel.

By consent of the parties, the grounds of appeal were argued by way of written submissions. The scheduling order was diligently followed, resulting in the filing of the appellants' in-chief submission and the respondent's comprehensive reply, and finally, a rejoinder submitted by the appellant.

In the first ground of appeal, the appellant contended that the trial court vested itself with jurisdiction it did not have when it proceeded to raise and determine issues of land ownership of the disputed premises. Counsel for the appellant referred on page 5 of the judgment and Section 167 (1) of the Land Act, Cap. 133 [R.E 2019]. Also, he cited the case of **Godlove Raphael Dembe vs Philipo Paul Ndunguru, Virginia Fredrick Rwezaura, and Justine Hamisi Fokoro,** Civil Case No. 130 of 2022.

Per contra, the respondent submitted that the claims in the trial court were loss and destruction of properties worth Sixty Million. Counsel for the respondent submitted that paragraph 5 of the Judgment was a

brief background of what transpired between the appellant and the respondent. He cited **Section 40 (2) b of the Magistrate Courts' Act,** Cap. 11 [R.E 2019] which vested powers to the District Court to entertain the matter due to the monetary value of the subject matter, and instead, the appellant is misleading the court.

In his rejoinder Counsel for the respondent submitted that the trial magistrate sailed in the wrong course by discussing issues of trespasser or squatter which is a land issue that could not be argued in a normal civil suit. He referred second to the fourth paragraph of page 5 of the judgment as also reflected in paragraphs 6 and 7 of the Plaint.

Having passed through the trial court's proceedings and respective submissions of the learned counsels, it can be observed that the dispute between the parties in the appeal can be traced through pleading mainly plaint. Paragraph 3 of the plaint provides that;

> ***3. That, the Plaintiff claims against the defendant is the sum of Tshs. 60,927,000/= being the total amount Plaintiff incurred for the destruction and loss of properties and Tshs. 30,000,000/= as general damages for pain and suffering and costs of the suit.***

Given the above-quoted paragraph of the plaint, it is clear that the cause of action that brought the plaintiff into the trial court is loss and destruction of properties. It is the appellant's submission that page 5 of the judgment trial magistrate discussed issues of trespasser and the squatter which are not supposed to be addressed in a civil suit. I joined hands with the respondent's counsel that it was just a mere reasoning of the trial magistrate in his judgment as it was a brief background and not what made him arrive at the decision. The first issue framed by the court was whether it was the defendant who removed the plaintiff's shipping container. In my view, the trial though touched on issues about land but he confined himself to the drawn issue on board, and the issues regarding land were discussed just to show the relationship between the appellant and respondent in the matter. Looking at the records, the course of action is a payment of compensation for the loss and destruction of properties worth Tshs. 60,927,000/= which is the specific damages, the jurisdiction of which is vested in the district court, and the Trial Court, so to speak. Therefore, this ground of appeal has no merit, and the same is dismissed.

Grounds 2, 3, and 4 were jointly argued by the appellant. They focused on the trial court holding that the appellant was responsible for

the removal of Plaintiff's shipping container whilst the same was not proven by Plaintiff. Counsel for the appellant submitted that, from the testimony of the respondent and the appellant himself, the eviction was not carried out by the appellant. According to the counsel, exhibit DE3 (notice) was not issued by the appellant nor did it mention him. Also, DW2 testified that the instruction was given by Puma Energy (T) Limited who had leased the plot, and not the appellant. He submitted that the trial magistrate deliberately ignored the testimony of DW2 and DE3 which led the court to commit material illegality that renders the judgment nullity contrary to Order XX Rule 4 of the Civil Procedure Code Cap. 33 [R.E 2019].

In reply Counsel for the respondent submitted that the appellant ought to have applied for his tenant to be joined as a part of the suit as he was aware that respondent's items were removed by his tenant. He submitted that the appellant in the trial court severally admitted to having been responsible for the removal of the respondent from his business. He referred to page 16 of the proceedings. He further submitted that the suit cannot be defeated by non-joinder of a party since the appellant and Puma Energy (T) Limited were not jointly responsible. He referred to page 6 of the Judgment that, the trial

magistrate advised the appellant to have joined Puma Energy (T) Limited by way of third-party notice but unfortunately the appellant waived his right by not doing so.

In his rejoinder, counsel for the appellant submitted that exhibits DE2 and DE3 show that the appellant did not evict the respondent. In his view, exhibit DE2 gives Puma Energy (T) Limited an exclusive right to enjoy the suit premises and the respondent was just a mere invitee in the suit premises who has no right to claim anything in the land. He cited the case of **Magoiga Nyankorongo Mriri vs. Chacha Mroso Saire,** Civil Appeal No. 464 of 2020.

After a thorough perusal of the trial court records and submission of the parties herein, I have noted that there is no evidence that the appellant removed the respondent from the suit property. The evidence on records shows that Remia Auction Mart was the one who removed the respondent from the premises as can be seen on page 2 of the Judgment. Also, from the proceedings, it is the testimony of the DW2, retail manager from Puma Energies (T) Limited, that Remia Auction Mart acted under their instructions and FB Attorneys to remove the respondent from the suit premises. Further to that, Exhibit DE3 which is the notice was tendered in the trial Court, and from that notice, it shows

Remia Auction Mart acted on behalf of Puma Energy. Of significance is that, the respondent's witness (PW3) supported the contention that, they were issued with a 14-day notice together with the respondent by Remia Auction Mart. Also, DW2 admitted that they were the ones who received the respondent. Given this, nowhere is shown that the appellant was the one who removed the container let alone that he destroyed or caused loss to the respondent. It is on this premise I hold that the respondent on reasons known to him personally decided to sue the appellant with no good cause. For the foregoing, this court finds these grounds of appeal have no merits.

In ground 5 of the appeal, counsel for the appellant submitted that the trial magistrate's findings that the removal of the respondent from the suit premises was illegal are unfounded because the appellant did not evict the respondent and the trial court did not consider the evidence in DE2 and DE4 since such evidence shows the respondent's container is placed to Plot No 4 Block C in which Puma Energy (T)Limited is a lessee and has all the rights while the respondent was mere invitee. He prayed the appeal to be allowed with costs.

Per contra, the respondent insisted that the appellant knew that it was his tenant who removed the container, therefore, he ought to have

joined him in the suit. He added that the appellant admitted in the trial court to have instructed Puma Energy(T)Limited to remove the respondent.

Given this ground of appeal, this court reiterates arguments in the above grounds 2,3 and 4 of the appeal. It is true that from the records of the trial court on page 7 reached the finding that the appellant had no legal justification to remove the respondent. In my view, this was wrong because no evidence that, the appellant removed the respondent. As I have pointed out, the Auctioneers acted under the instruction of Puma Energy (T) Limited and removed the respondent. Again, there was no evidence from the District Commissioner team established that the respondent's container was not within the appellant's property. I think the duty to prove such allegations was on the part of the respondent on the balance of probabilities. To discharge such duty, the respondent ought to bring such evidence from the team to testify on his behalf or at least give a clue to the trial court as to how that land was the road reserve. In the case of **Paulina Samson Ndawavya Versus Theresia Thomasi Madaha**, Civil Appeal No. 53 of 2017 the Court of Appeal observed that:

> ***"It is trite law and indeed elementary that he who alleges has a burden of proof as per section 110 of the Evidence Act, Cap. 6 [R.E 2002]. It is equally elementary that since the dispute was in a civil case, the standard of proof was on a balance of probabilities which simply means that the Court will sustain such evidence which is more credible than the other"***

Based on the above, it was not right for the trial court to rule in favor of the respondent, and for the foregoing this ground of appeal has merits.

In ground 6 of the appeal, the appellant faulted the award of Tshs. 20,000,000/=. He argued that the court found no proof as to how the respondent suffered loss and also no proof that the appellant was the one responsible for the injuries. He stated that there were mere words without substance to the respondent compared to the evidence adduced by the appellant, DW2, and Documentary evidence in exhibits DE2, DE3, and DE4. Counsel for the Appellant also submitted that the Trial magistrate awarded the prayer at a reduced amount of Tshs. 20,000,000/= in which such prayer was dismissed in the first place.

In his reply Counsel for the Respondent submitted that there were two prayers in the suit which was payment of Tshs. 60,927,000/= as specific damages and payment of Tshs. 30,000,000/= as general

damages. In which the specific damage prayer was dismissed for want of proof. The respondent was only awarded Tshs. 20,000,000/= as general damages which she awarded while exercising his discretional powers which is not subject to interference. He cited the case of **James Yoram vs Republic** (1951) 18 E.A.C.A 147, R**epublic vs. Mohamed Ali Jamal** 1948, 15 E.A.C.A 126 and **Bernadeta Paul vs Republic** TLR [1992] 92. He prayed this appeal be dismissed.

In his rejoinder, the respondent submitted that the award of Tshs. 20,000,000/= is unfounded since it was ruled that there is no proof of the same. He prayed the appeal be allowed.

After having read both written submissions and upon keenly perusing the trial court records, the judgment of the District Court of Kinondoni, having considered all the circumstances of this case, according to the records the Respondent in the main suit prayed for the orders as far as damages are concerned. That is Specific damages which are specifically needed to be pleaded and proved to see the case of **Bamprass Star Service Station Limited vs. Mrs Fatuma Mwale**, [2000] T.L.R 390, and general damages are awarded in the discretion of the court as it was stated in the case of **Peter Joseph Kilibika vs Partic Aloyce Mlingi,** Civil Appeal No. 30 of 2009 (CAT-Unreported),

when the court of appeal quoted with approval the words of Lord Dunedin as stated in the case of **Admiralty Commissioners vs. SS Susquehanna [1950] 1 ALL ER 392** on the award of general damages where it is stated that;

> ***"If the damage is general then it must be averred that such damage has been suffered, but the quantification of such damage is a jury question".***

As the law does not require the respondent to prove the claimed general damages. I have taken into consideration the fact that it is not in dispute respondent's container was removed from the suit premises. From the records again it is seen that special damages were not proved, hence trial magistrate dismissed them. The trial magistrate ruled that no one can benefit from their wrongdoings. Therefore, it was his discretion to award the general damage of the amount he was awarded.

However, as it is seen from the above-explained grounds of appeal and the case at hand there was not enough evidence that the appellant is responsible for the removal of the respondent's container. In other words, no connection with the loss or damage of the container and properties therein the respondent showed to the court that the appellant had his hands. The fact that he is the owner of the said pieces of land or

is the neighbor of the respondent does not make him pay for wrongs he did not commit. His defense was heavier than that of the respondent. That being said, the respondent was entitled to nothing. This ground, therefore, also lacks merit.

In light of the above discussion, I am of the profound view that the appeal has merit, and is allowed. The judgment and proceedings of the trial court are quashed and set aside. I have looked into the circumstances of the case and I am not going to award costs.

Order accordingly.

H. R. MWANGA

JUDGE

18/04/2024