

his 60 bags of cassava to the place he wanted to store them. Byabashaija took the 60 bags of the cassava flour to Kihiki Trading centre and stored them in the store of Sarapio Turyasingura the second plaintiff. But this was short Lived for two days later, soldiers from the same Training wing returned in the same army truck to Sarapio's store. They found Sarapio at his store and they demanded that the store be opened. Sarapio had no key to the store and requested them to give him time to collect the key which was with his wife in a nearby garden. He went. On his way back from the garden, Sarapio learned that the soldiers had already broken into his store. He proceeded and stopped at a distance from where he was able to see the soldiers loading some bags on the lorry. He feared to reach his store at the time so he kept away. After three days he came when the soldiers had already left. He confirmed that his store was broken into and the following items were missing from it:-

1. 60 bags of cassava flour each weighing 100 kilograms, belonging to Byabashaija Ben.
2. 4 Cartons of Rex Cigarettes
3. Cash of 980,000/=.
4. 2 bags of maize grains each weighing 100 kilograms
5. 2 bags of beans each-bag weighing 100 kilograms.
6. 1 big saucepan.

After apparently informing Byabashaija of what happened; Sarapio and Byabashaija both jointly reported the incident, to the office of the D.A. Rukungiri. On instruction of the D.A, the District Security Officer (DSO) Rukungiri wrote a letter Exh. PI which was handed to the Plaintiffs to deliver to the Brigade Commander at Kasese. The letter briefed the Brigade Commander of the Plaintiff's complaint against the soldiers under the command of Lt Kwesigwa and requested him (Brigade Commander) to resolve the problem of the Plaintiffs.

The two plaintiffs delivered the letter to the Brigade Commander at Kasese. The Commander first asked the plaintiffs to bring transport to transport the Brigade Intelligence officer to inspect the store. The Plaintiffs hired a pick-Up for the purpose but the Brigade I.O. was not available. Later the Brigade Commander tossed the plaintiffs about so much that the two felt frustrated and sought assistance in the President's office. From the President's office they were referred to the Army Commander. The latter in turn referred them to the Military Intelligence at Basiima House. From the Directorate of Military Intelligence some military Intelligence were sent to investigate the complaint. Two Military Intelligence officers visited the plaintiffs and inspected the broken into store of the 2nd plaintiff. Later they asked the plaintiffs to report to them at Basiima House after two weeks. The Plaintiffs did so, and were referred to the NRA Division Head Quarters at Fort

Portal where their problem was to be solved. The Plaintiffs went to Fort Portal but without any success. Despite being tossed about between all these authorities costing them colossal sums of money in terms of transport, subsistence and accommodation, the plaintiffs problem was never resolved and hence this suit.

At the commencement of the hearing of the case, three issues were framed as follows:-

- (1) Whether the plaintiffs properties were wrongfully confiscated by the defendant's servants acting in the course of their employment.
- (2) Whether the plaintiffs suffered any loss as a result.
- (3) What remedies if any, are the plaintiffs entitled to.

In the course of the hearing of this case some questions arose and I took decisions on them but reserved my reasons therefore to be incorporated in this judgment. I now propose to deal with these issues first:-

At the hearing, Counsel for the Plaintiff had sought to adduce in evidence a photocopy of a letter which was allegedly written by the DSC Rukungiri to the Brigade Commander of 322 Brigade in Kassese.

The Letter briefed, the brigade Commander on the alleged removal by NRA soldiers of the Ishasha Training Wing of the Plaintiff's properties from the store belonging to the 2nd plaintiff. The admission of this letter in evidence was objected to by counsel for the defendant on two grounds namely

- (1) That the photocopy of the letter was not a certified copy and
- (2) That it was not annexed to the plaint nor listed in the list of document to be attached to the plaint as required by 07 r. 14 (2) of the CPR and that as such the document was a surprise to the defendant.

For the Plaintiffs, Mr. Rezida contended that this photocopy of the letter was admissible in evidence as secondary evidence because there was evidence to prove that the original thereof was with the defendant. Secondly that the defendant who has the original of the letter could not certify the photocopy for the plaintiff. Thirdly that omission to include the document on the list of documents to be annexed to the plaint as required by 0.7 r.14 of the CPR was not fatal because the original thereof was with the defendant.

I had admitted the photocopy of the Letter in evidence for the following reasons:- There is no doubt that section 62 of the evidence Act requires that documents must be proved by primary evidence. This section prohibits proof of documents by secondary evidence. But this is a general rule. There are exceptions to this general rule. Section 63 of the evidence Act allows proof of documents by secondary evidence under certain circumstances, or example where there is

evidence that the original of the document sought to be so proved is with the opposite party.
What constitutes a secondary evidence are shown in section 61 of the evidence Act. This section covers photocopies.

In the instant case, the evidence of PW1 shows that the original of the letter was with the defendant. This therefore in my view justifies the proof of the document by secondary evidence as an exception to the general rule.

As regards the failure to comply with the provision of 0.7 r. 14 of the CPR, it is important to bear in mind the object of the rule. It is to provide against false documents being set up after the institution of the suit. However, in those cases where there is no doubt as to the existence of a document at the date of the suit, court should as a general rule admit the document in evidence though it was not produced with the plaint or entered on the list of documents in compliance with 0*7 r. 14 of the CPR. See (1) M.M. Datta Vs. Ahamed (1959) EA 218 at 220 (2) Lukyamuzi Vs. House and Tenant Agencies Ltd. (1983)HCB 74 - 75. In the instant case, the existence of the letter in

question as at the date of this suit is not in doubt. The evidence of PW1 and that of PW2 are very clear and loud on this. There is no contrary evidence. The document was written by one of the employees of the defendant to another in the course of their employment before the date of this suit. This in my view justifies the admission of the photocopy of the document in evidence though it was not annexed to the plaint or entered on the list of documents to be annexed to the plaint as required by 0.7 r. 14 of the CPR. It was on these grounds that admitted in evidence the photocopy of the letter and was marked Exh. PI.

The second point was that at the close of the case for the plaintiff, Counsel for the defendant sought to call evidence a move which counsel for the plaintiff strongly resisted. His ground for objection to this move was that the very nature of the defendant's defence does not entitle him to call evidence. That the WSD of the defendant was couched in a general denial without raising any defence. Counsel submitted that in such a situation the defendant was not entitled to call evidence. He cited and relied on the case of Sabiti Sebunya vs. A.G

HCCS No. 76/88. In that case the defendant filed a WSD which was couched in a general denial. It did not deal specifically with issues raised in the statement of claim as required by 0.6 r. 7 and 9 of the CPR.

My brother Judge Tsekooko held that by the nature of the defence, the Defendant was not entitled to call evidence as he raised no defence.

For the defendant, Mr. Mayanja conceded that the WSD was a general denial which put the plaintiff to strict proof of all the issues raised in the statement of claim. She argued that usually they file such a general defence but would follow with an amended WSD which deals specifically with the issues raised in the statement of claim. She submitted That the same was done here. She sought sympathy from court on the ground that the AG's chamber is a very busy Department. I could find no amended WSD in the court file.

In reply Mr. Resida submitted that the defendant had ample time to contact their client for detailed instruction to enable them file a proper WSD. He prayed that the defendant not be allowed to call his defence witnesses.

I was persuaded by the argument of Mr. Rezida and I refused the defendant to call evidence. My reasons for that decision are: Under 0.6.rr 7 and 9 of the CPR, &. Party who denies the pleadings of the opposite side is required to do so specifically. He must deal with each allegation of fact which he does not therein any defence which he might have. This will lay for him a foundation for calling evidence to support the defence he has raised.

In the instant case, paragraph 3.of -the WSD reads as follows:-

"Paragraph 3,4,6,79 a n d 10 of the plaint
are denied and at the hearing the plaintiff will be
put to strict proof". ,

The above pleading denied generally all the allegations of facts contained in those paragraphs of the plaint and put the plaintiff to strict proof thereof at the trial. It did not raise any defence.

In Joshi Vs. Uganda Sugar Factory (1968) EA 570 at 572 SPRY JA as he then was while considering a defence couched in a general denial said,

“On the other hand, when a defendant adopts a purely defensive attitude in his pleadings, he will not be allowed to conduct his case on a different footing or at least only on terms (Weitherger Vs. Englis (1916) ALLER.

Rep. 843 Pinson Vs. Lloyds and National Provincial Foreign Bank Ltd. (1941) 2 ALL ER 636)".

In the circumstances, such a defendant is not entitled to call any evidence to set up any defence because this will take the plaintiff by surprise. The rule of the game is fair play and not by ambush of the opposite side. It was for these reasons. That I rejected the request by counsel for the defendant for adjournment to call evidence. The hearing was then adjourned for submissions of counsels.

When the hearing resumed for submissions, counsel for the defendant informed me that her instructions were definitely not to submit but to press for adjournment until her witness was allowed to testify. That a letter had been written, from the A.G's chamber on the 24/4/92 informing the Registrar High Court that an amendment WSD had been sent to court with a request to file it. The alleged amended WSD as shown from the Copy with counsel for the defendant, dated 17/9/91 ~~some~~ six months after the original WSD was filed on 21/3/91.

That the amended WSD dealt with the issues raised in the plaint specifically and raised defences thereto. Counsel expressed surprise that the amended WSD was not in the court file and she declined to submit.

Mr. Rezida commented rightly in my view, that even if that amended WSD was on the court file, it would not have been properly filed because such a late amendment would require either leave of court or the consent of the Plaintiff, neither of which was sought. That in those circumstances there was no properly filed amended WSD.

I fully agree with that argument. Amendments of pleadings are regulated by 0.6 of the CPR. Late amendments require leave of the court or consent of the opposite party. In the instant case neither the leave of court nor consent of the Plaintiff was sought. Even if that amended WSD was in the court file, it would not have been properly filed, AS counsel for the defendant refused to submit a decision which in my view was ill grounded, I allowed counsel for the Plaintiff to deliver his Submission. He did.

On issue No.1 which is whether the Plaintiffs properties were wrongfully confiscated by the defendant's servants acting in the course of their employment; Mr. Rezida contended that the answer to this question is in the affirmative. He relied on the evidence of Sarapio Turyasinguza PW1. The evidence of this witness shows that on 8/4/90 at about mid day, soldiers of the NRA who were attached to the Ishasha Training wing came in an Army Truck to his store at Kihihi Trading centre and demanded that open the store for them. He had no key to the store at the time and requested them to allow him time to fetch the key from his wife from a nearby garden. On his way back, he learned that the soldiers had already broken into the store. He moved and hid nearby where he could see the soldiers loading some

bags on to their lorry. In the store there were 60 bags of cassava flour belonging to Byabashaija PW2, 4 cartons of Rex Cigarettes, cash of 980,000/=.

two bags of maize grain, two bags of beans and one big saucepan. Three days later when he finally came to his store, he confirmed that the store was indeed broken into and the above items were missing.

The above evidence was corroborated in all material particulars by the evidence of Byabashaija PW2. The evidence of this witness added that some days earlier the soldiers from the same training wing had removed his 120 bags of Cassava flour from a store at Ishasha. That on the intervention of the DA, Rukungiri, 60 bags were returned to him and he later stored them in the store of Sarapio. Exhibit PI a letter written by the DSO Rukungiri to the Brigade Commander of 322 Brigade Kasese corroborates the evidence of the two witnesses. It would appear that the soldiers were motivated to remove the cassava flour on suspicion that the same was intended to be smuggled outside the country. But there was no evidence in support of their suspicion. There was no evidence, to rebut the evidence of the plaintiffs. I have observed the two witnesses for the plaintiffs and they have impressed me as truthful witnesses. They gave their evidence forthrightly and similarly answered questions put to them in cross-examination. I am convinced that they narrated to the court the truth of what happened to their properties. On the evidence there was no lawful justification for the soldiers to take away the properties of these plaintiffs. The confiscation of the properties of the plaintiffs was therefore wrongful. This answers issue No. 1 in the affirmative.

This leads me to issue No. 2 which is whether the plaintiffs suffered any loss as a result.

Counsel for the plaintiffs contended that both plaintiffs suffered losses as a result of the wrongful confiscation of their properties:-

That they lost their properties which were confiscated.

I am persuaded by this argument. There is the evidence of PW1 and that of PW2 which I believe. The evidence shows that each of the two plaintiffs lost their properties which were confiscated.

1st Plaintiff- Byabashaija lost;-

(1) 120 bass of cassava flour each of which weighed 100 kilograms.

2nd Plaintiff – Sarapio Turyasinguza lost; -

1) 4 cartons of Rex Cigarettes

2) Cash of shs. 980,000/=.

- (3) 2 bags of maize grain each weighing 100 kilogram
- (4) 2 bags of maize grain each weighing 100 kilograms
- (5) 1 Big saucepan and

(6) Damage to the door of his store, at the breaking in.

Counsel also argued that each of the Plaintiffs incurred out of pocket expenses in forms of transport, subsistence and accommodation in the course of their chasing this matter. That under this heading the plaintiffs jointly lost a total of shs. 2,600,000/=(1st plaintiff- 1, 200,000) and 2nd plaintiff- 1,400,000/=). Counsel further submitted that the plaintiffs had spent money to hire a vehicle to transport the Brigade IO. to inspect the store which was broken into. That the vehicle hired was a Toyota Hillux Pick-Up at 250,000/= Counsel further submitted that the Plaintiffs lost their businesses as a result.

That Byabashaija had to sell away his Pick-Up in order to boost his business after this incident. As for Sarapio he was completely put out of business. That for all these they claim general Damages.

In my view, the above out of pocket expenses and loss of business earnings must be claimed as special Damages, and the law regarding special damages appears to be settled in this country.

It is that special damages must be specifically pleaded and Strictly proved. See KCC Vs Nakye (1972) EA at 449.

In the instant case, the plaintiffs did not plead the above out of pocket expenses and loss of business earnings as special damages. In that case the amount of money spent by them from their pockets in transport, subsistence and accommodation or in the hire of vehicle while they were following this problem cannot be recovered as general damages.

This leads me to issue No. 3 which is what remedies if any, are the plaintiffs entitled to.

For the Plaintiffs Counsel submitted that the claim is in detinue. That as such the Plaintiffs are entitled to the value of their goods if not returned, as at the date of judgment. He cited and relied on the case of Patrick Mayingo Vs. The AG. HCCS No. 66887 - a High Court Judgment. It is unreported. The case set out the ingredients of the tort of detinue and decides on the fact that in detinue the value of the subject matter of the suit if not returned, must be assessed as at the date of judgment. I agree with this view.

According to that case, to succeed in detinue the following ingredients must be established:- (1) that the property the subject matter of the suit was seized and taken away. (2) that the defendant has refused to return the goods after the plaintiff has made a demand for its return. (3) that the plaintiff is entitled to immediate possession of the goods at the commencement of the action.

The above legal proposition can be found also in Salmond on the law

of Tort 17th Edn. Page. 112 It was also earlier held similarly in the

case of Amrital Hansraj Sheth vs KV Nathwani (1960 EA 447.. In Sheth's case

It was further stated that proof of ownership of the goods does not discharge the burden on the plaintiff to prove his entitlement to immediate possession of the goods at the commencement of the action. In Sheth's case reliance was placed in a passage in the judgment in Salim Shaikh vs. Boidonath Ghuttuck (1868) 12 V/R 217 at 218. It was quoted with approval. The passage emphasized the fact that possession of the goods raises a legal presumption that the possession is lawful and that the Plaintiff has to lead evidence to prove his entitlement to immediate possession of the goods at the commencement of the action.

It reads:-

"A person in possession of property ought to be presumed to be in lawful possession until the contrary is shown; but this is, I believe the only presumption which a Judge as a matter of law is absolutely bound to make. For any purpose beyond this possession is only evidence to be taken conjointly with the other evidence if any, by which it is sought, to establish or impugn the title"

Clearly if at the commencement of the action, the property the subject- matter of the suit is in the possession of the defendant, the law presumes in his favour that he is in lawful possession thereof. It is therefore up to the Plaintiff to lead evidence that despite that possession, the plaintiff was entitled to immediate possession of the goods at the commencement of the action.

In Sajan Singh vs. Sandara Ali (1960), ALLER 269 where the action was in detinue relating to the detention of a motor lorry, Lord Denning as he then was emphasised the need of a Plaintiff to prove his entitlement to immediate possession "of the goods at, the commencement of the action as a pre-requisite to succeed in an action in detinue. He put it in this form;

"It was an action for declaration coupled with a claim in detinue. In order to get a - declaration, it was essential for the Respondent to show that he was the owner of the lorry and that it was an authorised vehicle:- In order to succeed in detinue, it was essential for the Respondent to show that he had the right to immediate possession of the lorry at the time of commencing the action arising out of an absolute or special property in it."

I respectfully agree with the above exposition of the law. The

burden to prove all the ingredients of the tort of detinue is therefore on the plaintiff.. He must show his entitlement to immediate possession of the goods at the commencement of the action. Like in any civil

action, the standard of proof is on the balance of probability.

In the instant case, counsel for the Plaintiff submitted that the evidence on record establishes on the balance of probability all the essential ingredients of the tort of detinue. I agree with him.

The evidence of PW1 and that of PW2 show that the properties of the 1st plaintiff-Byabashaija were taken by the defendant's servant partly from Ishasha Trading Centre and partly from the store of Sarapio the 2nd Plaintiff, while the properties of Sarapio were all taken by the defendant's servants from his (Sarapio' s) store at. Kihiki Trading centre. The evidence further establishes that there was refusal by the defendant's servant to return the plaintiff's goods when the latter demanded for their return. The evidence finally establishes that the plaintiff were entitled to immediate possession of their goods at the commencement of the action, their entitlement arising from absolute property in the goods. There was no evidence of contrary claim of property over the goods. On these grounds, I am satisfied that the Plaintiffs have proved their claim in detinue on the balance of probability. They must therefore succeed.

Having found that the plaintiffs have succeeded in their claim in detinue, it is the law that in detinue, the plaintiff is entitled to his goods or if not returned, to their value as at the date of judgment, general damages for having been deprived of the possession of his goods during the detention thereof; interest on the decretal amount and cost of the action- See Patrick Mayingo Vs. the AG. above;

In the instant case, the evidence of PW3 set out the value of the plaintiffs goods as at the date of judgment as under:-

1st Plaintiff:- (1) 120 bass of cassava flour at 36,000/= per bag of

100 kilogram = 4,320,000/=.

2nd Plaintiff:- (2) 4 cartons of Rex Cigarettes at 270,000/= per carton = **1,080,000/=**

(5) 2 bags of beans weighing 100 kilograms each at 60,000/= per bag =
120,000/=

(4) 2 bags of maize grain each weighing 100 kilogram at
28,000/= 56,000/=.

(5) Cash of shs. 980,000/=.

There was no contrary evidence. I therefore take the above to be the current value of these goods. Judgment will therefore be given to the plaintiffs for those value of the goods. So it is ordered.

The Plaintiffs are also entitled to general damages for having been unjustifiably deprived of the possession of their goods during the detention thereof by the defendant's servants. For this I award each plaintiff shs. 50,000/= I also award them interest at court rate on the decretal amount from the date of filing the suit until payment in full. The defendant is to pay cost of this suit.

G.M. OKELLO

JUDGE

16/6/92

Judgment delivered in the chamber in the presence of:-

- 1) Mr. Rezida counsel for the plaintiff
- 2) Both plaintiffs present.

No representative of the defendant was present.

G.M OKELLO

JUDGE

16/6/92

