IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: MANYINDO, D.C.J, ODER, J.S.C & PLATT, J.S.C)

CIVIL APPEAL NO. 26 OF 1992

BETWEEN

DEPARTED ASIANS PROPERTY

CUSTODIAN BOARD : : : : : ::::::::::::::::::::::::::::::::::::::APPELLANT

ISSA BUKENYA t/a

NEW MARS WAR HOUSE : : : : :::::::::::::::::::::::::::::::: RESPONDENT

(Appeal from the Judgement and Decree of the High Court. of Uganda at Kampala (Mrs. Justice A.E. Mpagi—Bahigeine) dated 9/4/91)

IN

HIGH COURT CIVIL SUIT CASE NO. 518A/88

JUDGEMENT OF PLATT, JS.C:

As a result of ex parte proceedings in which Judgement was given for the Plaintiff on the 9th April 1991 the Plaintiff Issa Bukenya was given judgement. The Defendant the Departed Asians Property Custodian Board now appeals claiming that although the Board did not appear to defend the case, nevertheless the plaint was not in proper order and the remedies given by the Learned Judged were wrong. In the first ground it is alleged that the learned Judge erred in law by awarding special damages of 14,602,210/= to the respondent when that had not been explicitly pleaded in the plaint or strictly proved. In ground 2 it was said that the Judge ought to have awarded 96O,OOO/= as lost income when there was not sufficient evidence to support that finding, and in ground 3 it was alleged that the Judge ought to have applied the provisions of the Currency Reform Statute of 1987 to both the special and general damages awarded.

It is necessary then to glance at the plaint to see what was alleged and claimed. It was said that at all times the Plaintiff was the lawful occupant of shop No. 6 Plot 76/78 on william Street, Kampala, having been allocated these premises, although the premises fell under the jurisdiction of the Defendant Board. It was alleged that the plaintiff observed his obligations to the Defendant. Nevertheless by a letter dated 16th March, 1987 the Defendant wrongfully terminated the Plaintiff's lawful occupation of the shop, and as a result the premises were re-allocated to a certain person called Miss. A. Ngoga. Then on the 1st April, 1987 the Defendant wrote a note to the Plaintiff, warning the Plaintiff not to break the Defendant's padlock, and informed him of the re-allocation. The Plaintiff thereupon complained to the Defendant that his personal property had been locked up in the said shop and as a result their security was at stake. The Defendant wrote to one of his agents a certain Kakooza, directing him to open the premises so that the Plaintiff my remove his property. Unfortunately Mr. Kakooza did not heed this direction, and Plaintiff's property remained up in the Defendant's premises. When Miss Ngoga took possession of the premises the Plaintiff was not notified and subsequently when the Plaintiff contacted her about his property, she denied any knowledge about it. The defendant Board also denied any knowledge or possession of the Plaintiff's property. Consequently, as a result of the Defendant's unlawful act the Plaintiff lost his property which was listed in paragraph 8 of the plaint. In addition the lost money which he had incurred in obtaining a licence and tax clearance for the year 1987. On these facts the Plaintiff sought: -

"a) recovery of his property as particularised in paragraph 8;
b) general damages for:
(i) trespass to property;
(ii) loss of the benefit of licence;
(iv) loss of business;"

He also claimed interest and costs.

The learned Judge after hearing the Plaintiff's evidence in proof of his claim found that the shop had been allocated to the Plaintiff on the 27th January, 1973. During 1982 he received notification from the Defendant Board that the latter was no longer his landlord, because Mr.

Gandesha had been given back the property. Then the Board told him to vacate the shop on 18th March, 1987 for non-payment of rent to the Board (such rent having been paid to Mr. Gandesha) Mr. Gandesha wrote to the Board clarifying the position. As a result the Board wrote to the security guard Kakooza, who had locked up the shop in the Plaintiff's absence, to open the shop and allow the Plaintiff to take out his personal property. Kakooza did not do so. Then the Plaintiff found Miss Ngoga operating the shop and she refused to give him his goods but directed him to the Board. The Board then sent the Plaintiff away and the Plaintiff was obliged to bring this suit which he did in 1988. The learned Judged ended her Judgement as follows:

"The evidence adduced has not been controverted. I have perused the exhibits with particular care considering the fact that proceedings have been ex parte. In the circumstances I have no alternative but to enter judgement for the Plaintiff as prayed for the value of the property amounting to 14,602,210/=; Lost average income at 80,000/= per month for a whole year amounting to 960,000/= and interest on the said amount at the rate of 12% per annum till payment in full together with costs of this suit."

The first ground of appeal which appears to be simply a question of whether special damages had been or had not been explicitly pleaded in the plaint, turned out to be an argument of a more fundamental nature. As stated above the Plaintiff prayed for: —

"a) recovery of his property as particularised in paragraph 8."

But in argument he gave up that claim stating that probably the recovery of the specific goods at the time of the ex-parte proceedings in January, 1991 would be unlikely, and so the Plaintiff asked for the value of the goods. The first argument therefore is that the value of the goods was not an option called for by the Plaintiff in prayer (a). The second argument is that if the Plaintiff knew the exact items which he had lost he should have claimed them as special damages and given the value. But on the other hand such a claim as that in the second argument would not easily fit within the plaint unless it could come within prayer (b) general damages for trespass to property.

A similar type of argument concerned the award of loss of business which was claimed in prayer

(b) general damages for (iii) loss of business." How was that pleaded? In paragraph 9 it is said that in addition the Plaintiff lost money which he had incurred in obtaining a trading licence and tax clearance for the year 1987. There is no claim in the body of the plaint that the Plaintiff made a business loss. Accordingly the prayer for general damages for loss of business was not supported by any allegation of that nature and no particulars of the loss were given. It is particularly curious how the learned Judge came to the conclusion that the Plaintiff had lost an average income of 80,000/= per month amounting to 960,000/= for the whole year. Even if one accepts that the Plaintiff was evicted wrongly this claim would depend upon the nature of his allocation and the notice by which the allocation could be terminated. It is important to note that this claim is entirely different from the claim with regard to the Plaintiff's goods locked up in the shop. The claim for loss of business per month depends upon possession of the shop, and is not for instance, profit on the sale of the stock once and for all. If the notice was a notice of one month then the Plaintiff could only have at most one month's loss of business assuming that no notice was given. It may be that for non-payment of rent no notice at all had to be given. But as none of these matters were pleaded in the body of the Plaintiff the prayer in paragraph (b) (iii) is left without foundation and could not have been acted upon.

The Plaintiff claims through his Counsel that the prayer (a) in the plaint was sufficient for the trial Court to have given one of the three remedies. Reliance was placed upon the observation of Diplock L.J. in General and Finance Facilities Ltd v.Cooks Cars (Romford) Ltd 1963 W.L.R. 644 that an action in detinue may result:-

"In a judgement in one of the three different forms;
(1) for the value of the chattel as assessed and damages for its detention; or (2) for return of the chattel or recovery of its value; or (3) for return of the chattel and damages for its detention."

That may well be so, but it is for the Plaintiff to choose which form of action he would like. For example looking at Atkin's Court Forms Second Edition Vol 39 p. 137 in form No. 3 the endorsement on writ for return of goods and for damages for detinue provides that the claim is for the return of the goods or their value and damages for detaining the same. In Form 4 one can see how the Plaintiff can seek a declaration that the goods belonged to the Plaintiff and how he

may claim the return of the goods or their value and damages for their detention, and alternatively, damages for conversion of the goods. In form 1 (p.136) one may observe how the Plaintiff may claim damages for trespass to goods, and in Form *2* (p137) damages for conversion of the goods. These are all different ways in which the Plaintiff can choose the remedy he wants and the explanation is as follows: —

“2. The cause of action. Trespass to goods consists in the unlawful disturbance of the possession of the goods by seizure, removal, or by a direct act causing damage to the goods (j). To constitute conversion there must be a positive wrongful act of dealing with the goods in a manner inconsistent with the owner’s rights, and an intention in so doing to deny the owner’s rights, or to assert a right inconsistent with them (k). In many cases the same facts may constitute both trespass and conversion; thus, where a man steals goods he commits trespass by interfering with the possession of them and conversion by appropriating them to his own use. Mere damage to goods, however, or a mere removal of them without appropriation, is no conversion, though it may be trespass
(1). Conversely, a bailee who misappropriates goods is liable in conversion but not in trespass, *as*, already having lawful possession of the goods, he cannot be said to have disturbed it; moreover a mere denial of title to goods may amount to a conversion (m), but it cannot be a trespass, as possession is disturbed.

Detinue consists in a wrongful with holding of the Plaintiff’s goods (n). It is the proper action to bring if the plaintiff wished to recover possession of his goods, and not merely their value (p). It is distinct from conversion in that a demand and refusal (the essence of the action of detinue (q) is not itself a conversion, though it may be evidence of a prior conversion (r). Moreover conversion is a single wrongful act, and the cause f action accrues at the date of conversion. Detinue is a continuing cause of action which accrues at the date of the wrongful refusal to deliver up the goods and continues until delivery up of the goods or judgement in the action for detinue (s).

As will be seen, the old law as to the proper cause of action was in many ways highly technical, but the importance of this technicality has largely disappeared since the introduction of the modern form of pleading. Today the court can give the remedy which the facts justify, even if the

plaintiff may have called his action by a wrong name (t). Indeed there is now need to state the particular for, of action either in the writ Cu) or in the statement of claim(a).”

When the Plaintiff claims the return of his goods he is of course claiming in detinue. As the quotation above points out detinue is distinct from trespass and it is up to the Plaintiff to seek the remedy in detinue that he wants. If the Plaintiff only wants the return of the goods that would, as Diplock L.J. pointed out be similar to the situation at common law. But since the Court would not normally order specific restitution of ordinary articles in commerce it would be usual to ask for the value of the chattel as assessed and damages for its detention. In any event the Plaintiff has given up his claim for the return of the goods set out in paragraph (8) of the plaint. There is no claim for the value of the goods or damages for detention; indeed there is no evidence to support the latter damages for detention. What there is is a claim for damages for trespass to goods. That claim is not apt to complete the claim for detinue namely the value of the goods, and the damages for detention. Trespass to goods consists in any unlawful possession of the goods by seizure, removal or by d direct act causing damage to the goods. The actions are not alleged here. The Board did not steal the goods or take them from the Plaintiff by removing them and it did no direct act causing damages to the goods. There was thus no pleaded action of trespass to the goods or indeed of conversion of the goods by acting in such a manner as would be inconsistent with the Plaintiff’s rights, or acting with an intention to deny the Plaintiff’s rights to assert some right inconsistent with the Plaintiff’s rights. It follows then that prayer (b) (i) damages for trespass to goods cannot fill up the missing claims under prayer (a), nor can it stand by itself as a distinct prayer for trespass. It is thus unfortunate that the Plaintiff’s plaint does not claim the value of the goods as awarded by the learned Judge.

It is said that nevertheless the Court can give what judgement it likes. The Plaintiff may have in mind such cases as appear in Atkin’s at page 130 that today the Court can give the remedy the facts justify even if the Plaintiff may have called his action by a wrong name. There is now no need to state a particular form of action. But it is to be noted that while the nature of the claim that is either conversion or detinue may be one thing, such words as “damages for conversion” are a convenient method of expressing a claim for damages, as opposed to the claim for the return of the goods or their value, (the claim in an action of detinue). There is unfortunately nothing for the Court to do, but to declare that upon this plaint the Plaintiff only asked for the

return of the goods and not their value nor damages for detention, and he asked for damages for trespass which was supported by the pleadings in the body of the plaint. It is not possible for the Court to use the claim for damages for trespass as the claim for the value of the goods and damages for detention. The only conclusion can be, that the Plaintiff did not put forward a proper plaint, upon which evidence could be led so that judgement could be given on the general question of interference to the Plaintiff's goods.

As I have stated above there was no way in which the claim for loss of business could be made without allegations in the plaint to support it, and one cannot see that the Plaintiff had lost the benefit of this licence. That again should depend upon the terms of allocation. In these circumstances I need not consider whether the Currency Reform Statute of 1987 applied.

I should, however, draw attention to the duty of the Court when conducting ex-parte proceedings. If allegations are made in the plaint so that the facts alleged support the prayers asked for, and when the prayers called for are legally justified, then all that is necessary is for the trial Court to hear evidence which proves the facts and hear submissions of law that the remedies are justified. Care must of course be taken that the distinction between general and special damages is satisfactorily pleaded. It must be understood that the evidence led is such, that without contradiction by the Defendant, it is sufficient to prove the claim. It is not necessary that the facts alleged should be queried, but the facts alleged must be full and accurate enough to support the plaint. A Judge may assist the Plaintiff in pointing out that the evidence so for adduced is not sufficiently full and accurate, and that other evidence, documentary or oral, may be needed to support the claim. What cannot be done is that remedies are granted as prayed, which are not supported by the pleadings. It is of course open to the Plaintiff to amend his pleadings. But if that is done, the amendment must be served upon the Defendant, who may then have the right to appear and defend the case. In this case the learned Judge should have observed that the pleadings did not support the remedies wanted. She should have called for amendments of the plaint which would have resulted in the amendment being served on the Defendant and the Defendant allowed to be present. I should also perhaps note that this judgement does not interfere with the judgement of the trial Court that in principle the Plaintiff acted wrongfully. Even so, the wrongful action did not result in the remedies prayed for, because of a want of proper pleadings.

In conclusion I would allow the appeal and set aside the judgement of the trial Court. I would award the costs of this appeal to the Defendant/Appellant.

I would substitute a judgement in favour of the Appellant Board in that while the Board wrongfully interfered with the goods of the plaintiff, the plaintiff did not plead or prove the remedies he asked for. Each party will bear own costs of the ex- parte proceedings in the special circumstances of this case.

Dated at Mengo this 19th day of January 1993

H.G. PLATT

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original.

B. F. B. BABIGUMIRA

REGISTRAR SUPREME COURT

JUDGEMENT OF ODER J.S,C.

I have had the benefit of reading in draft the judgement of Platt, J.S.C.with which I agree and have nothing useful to add.

Dated at Mengo 19th day of January.

A.H.O. ODER

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original.

B.F.B. BABIGUMIRA

REGISTRAR OF SUPREME COURT

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JUDGEMENT OF MANYINDO, DCJ:

I have read in draft the judgement of Platt, JSC with which I agree. I also agree to the orders proposed. As Oder JSC also agrees this appeal is allowed with costs to the appellant. The judgement of the lower Court is set aside and judgement dismissing the claim with costs is substituted therefore. Each party shall suffer its own costs in the lower Court.

Dated at Mengo this 19th day of January, 1993

S.T. MANYINDO

DEPUTY CHIEF JUSTICE