IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: JUMA, C.J., MUGASHA, J.A., And NDIKA, J.A.)

CIVIL APPEAL NO. 223 OF 2017

SHADRACK BALINAGO ..... APPELLANT

VERSUS

1. **FIKIRI MOHAMED @ HAMZA**
2. **TANZANIA NATIONAL ROADS AGENCY (TANROADS)**
3. **THE ATTORNEY GENERAL**

..... RESPONDENTS

(Appeal from the Judgment and Decree of the High Court of Tanzania at Mwanza)

(Ebrahim, J.)

dated the 13th day of October, 2016
in
HC Civil Case No. 5 of 2011

.....

JUDGMENT OF THE COURT

1st & 9th October, 2018

NDIKA, J.A.:

At the centre of the dispute in this matter is the private use by the first respondent of a part of a road reserve along the Mwanza – Musoma public road as a nursery upon a permit granted by the second respondent.

The appellant, acting as the administrator of the estate of his deceased father, the late Simon Balinago, sued the first respondent in the High Court at Mwanza claiming that the aforesaid use created an obstruction off the said public road to his commercial building, which adjoins the road reserve, causing him enormous loss of business. He, too, claimed that in the midst of the wrangle over the use of the road reserve and obstruction to his building, the first respondent initiated a malicious prosecution against him on a false accusation that he had stolen and destroyed some of flowers and plants at the nursery. Along with the first respondent, the appellant sued the second respondent, an executive agency responsible for the development, maintenance and management of public roads and road reserves in the country, and the third respondent in his capacity as the Principal Legal Adviser of the Government by virtue of sections 6 (1) and 9 of the Government Proceedings Act, Cap. 5 RE 2002.

Following a full trial featuring two witnesses supported by several documentary exhibits on behalf of the appellant as well as three witnesses on the adversary side, supported by three documents, the High Court dismissed the action in its entirety with costs. Aggrieved, the appellant now appeals to this Court.

To appreciate the contested issues in this dispute, we find it necessary to preface this judgment with abridged facts of the case.

On 27th February, 2006, the second respondent, through its Regional Manager, Mwanza, Mr. E. Korosso, issued the first respondent a temporary permit (Exhibits DE.1 a-c) for the use of a portion of the road reserve located at Buzuruga, Mwanza City along the Mwanza – Musoma public road as a nursery for growing and selling flowers, ornamental trees and other amenity plantings. The permit, made in accordance with the Highway Act, Cap. 167 RE 2002 (subsequently repealed and replaced by the Roads Act), was for a term of twelve months commencing 27th February, 2006 and was subject to a number of conditions including payment of an annual rental fee. The appellant, acting as the administrator of the estate of the late Simon Balinago, was disaffected by the second respondent's use of the licensed area. In his suit against the respondents in the High Court he claimed that the first respondent's flowers and plants in that area blocked out "easements and entrance" to his commercial building lying on the adjoining land known as Plot No. 3, Block 'HH', Buzuruga, Nyakato, Mwanza City. He alleged that shops in the building were impeded or obstructed by the nursery lying at the front of that building leading to loss

of customers and, by extension, loss of business profits. It is noteworthy that the business operations at the building started in earnest in the year 2010.

In a bid to remove the obstruction, the appellant engaged the second respondent as the statutory authority responsible for the administration and management of public roads. He also sought the intervention of the leadership of the locality as well as the District Commissioner of Ilemela in 2010 who, in response, directed an immediate cessation of the nursery operations (relevant correspondences admitted as Exhibits PE.1 a-c). It is seemly that the second respondent did not renew the first appellant's permit on account of breach of the terms of the permit by the first respondent. As a result, the second respondent attempted on several occasions to stop the nursery operations and served on the first respondent several notices to vacate the occupied area. Nonetheless, all this effort was to no avail as the first respondent did not heed to the demands.

While the dispute over the nursery operations remained unresolved, on 4th May, 2010, the appellant was arrested by the Police and subsequently arraigned before the Nyamagana District Court on two counts

of stealing and criminal damage to property at the nursery worth TZS. 15,675,000.00. In the course of the prosecution, initiated upon an accusation made by the first respondent, the appellant was remanded at Butimba Prison for six days. The charges were subsequently discontinued on 13th July, 2011 upon the Director of Public Prosecutions (DPP) entering *nolle prosequi* under section 91 (1) of the Criminal Procedure Act, Cap. 20 RE 2002 (CPA). It was the case for the appellant before the High Court that the prosecution against him was actuated by malice and was without any reasonable or probable cause.

Accordingly, the appellant sought, among others, the following reliefs from the High Court: first, an award of general damages to the tune of TZS. 100,000,000.00 for wrongful use of the portion of the road reserve as a nursery in front of his commercial building. Secondly, an award of TZS. 50,000,000.00 against the first respondent for malicious prosecution. Thirdly, immediate removal of the first respondent's flowers and plants from the road reserve in front of the commercial building.

The High Court framed four issues for trial: **one**, whether the first defendant's/first respondent's nursery blocked an easement and customers entrance to the plaintiff's/appellant's shop. **Two**, whether the

plaintiff/appellant was maliciously prosecuted. **Three**, if the first and second issues are answered in the affirmative, then, whether the plaintiff/appellant is entitled to damages and reliefs as claimed. And **finally**, to what reliefs are the parties entitled.

On the first issue, the Court considered the testimonies of the appellant (as PW1) and his witness (PW2 Jane Lushinge Mayala) as well as several exhibits. On the opposite side, the court took into account the evidence of the first appellant (DW1), his witness DW2 Hamisi Ndege Lubi (a local leader) and the second respondent's witness (DW3 Engineer Felix Mlima Ngaire). In addition, the court considered the notes and observations made on 30th August, 2016 when it visited and examined the *locus in quo*. In its judgment, the court made several findings relating to the first issue: first, that the nursery lay within the road reserve and that it had not encroached upon the appellant's land. Secondly, that the nursery operations were dormant and that all plants there were all dead. Thirdly, that there was no obstruction of the access or easement to the appellant's building. Most tellingly, the court held that:

> *"The plaintiff has no exclusive right over the area as he makes this court believe as the place is a public*

place and it is not used in contravention of law set by the body that has authority to manage and authorize the use of the same. If at all he wants to claim on the right of easement, he should show how his right has been infringed. I find that the plaintiff seeks to blame someone else for the loss of his business."

In the end, the court determined the first issue in the negative.

Next, the court considered and answered the second issue – whether the plaintiff/appellant was maliciously prosecuted by the first respondent – against the appellant. In so holding, the court, at first, found it proven that the appellant was, indeed, arrested by the Police and arraigned in the District Court on the charges of stealing and criminal damage to property of the first respondent upon an accusation made by the first respondent to the police. It was also established that the said charges were later on discontinued on 13th July, 2011 upon the DPP entering *nolle prosequi*. Applying the authority of **Hosia Lalata v. Gibson Zumba Mwasote** [1980] TLR 154 on the ingredients of malicious prosecution, the learned trial judge made three key findings: first, that even though the appellant was prosecuted at the instance of the first respondent, the said

prosecution was mounted with reasonable and probable cause as there was cogent and unchallenged evidence that the appellant once threatened the first respondent that he would destroy the nursery. Secondly, there was no proof that the first respondent was actuated by malice in setting the legal machinery into motion. And finally, since the appellant was discharged after the prosecution was discontinued by the DPP under section 91 (1) of the CPA and that there was no bar for the charges being re-instituted on the same facts in the future, it could not be conclusively said that the matter ended in the appellant's favour.

In the premises of the learned trial judge's determination in the first and second issues, the third and fourth issues naturally and logically ended against the appellant and, as hinted earlier, his suit came to naught.

In this Court, the appellant challenges the High Court's judgment and decree on three grounds as follows:

1. That, the learned trial judge erred in law and in fact by holding that the first respondent's garden did not block an easement and customers' entrance to the appellant's shop.

2. That, the learned trial judge erred in law by holding that the appellant was not maliciously prosecuted.
3. That the learned trial judge erred in law by refusing to award damages to the appellant.

At the hearing of the appeal before us, the appellant and the first respondent appeared in person, unrepresented whereas Mr. Robert Kidando, learned State Attorney, teamed up with Ms. Lilian Meli, learned State Attorney, and Mr. Saady Rashid, learned advocate, to represent the second and third respondents.

Submitting, the appellant adopted his three grounds of appeal as well his all-encompassing written submissions and a list of authorities that he had filed earlier. Without highlighting the thrust of the written submissions, he prayed that the appeal be allowed with costs and rested his case.

The first respondent did not file any written submissions. He had nothing to say at the hearing apart from praying that the appeal be dismissed with costs.

On the part of the second and third respondents, Mr. Kidando adopted the written submissions in opposition to the appeal and prayed

that the appeal be dismissed with costs for want of merit. He submitted that the road reserve is a protected area under section 29 of Roads Act, 2007 (the Roads Act) and that it was supervised and managed by the second respondent. It was his argument that the appellant had no exclusive right over the road reserve adjacent to his property and that he had no standing to compel the first respondent to remove his flowers and plants from the nursery.

On being asked by the Court on the import and breadth of section 29 of the Roads Act, Mr. Rashid rose to submit that said section provides the procedure for a land owner to apply for a permit to the second respondent for construction of a road of access from a public road to his land so as to provide reasonable access or road of access to such land. It was his further submission that if the appellant had no road of access to his shopping building he should have applied for it under the said provisions.

The respondent had nothing to say by way of a rejoinder.

Having carefully examined the written and oral submissions of the parties as well as the authorities filed, we think the issues before us for determination of the appeal in the light of the three grounds of appeal are

the following: **one**, whether there was a blockage or obstruction of the appellant's easement to the commercial building thereby impeding his customers' access; **two**, whether the appellant was maliciously prosecuted; and **finally**, whether the appellant is entitled to damages.

In dealing with the above issues as the first appellate Court, we are enjoined by the provisions of Rule 36 (1) (a) of the Tanzania Court of Appeal Rules, 2009 to re-appraise the evidence on the record and draw our own inferences and findings of fact subject, certainly, to the usual deference to the trial court's advantage that it enjoyed of watching and assessing the witnesses as they gave evidence. See, for instance, **Jamal A. Tamim v. Felix Francis Mkosamali & The Attorney General**, Civil Appeal No. 110 of 2012 (unreported).

Beginning with the first issue, we would observe, at the outset, that the appellant could only maintain an action for unlawful blockage or obstruction of his alleged right of way over the area used as a nursery by the first respondent only if he had, at first, justifiably established that he, indeed, had an easement over that area. But, then, what is an easement? Section 144 of the Land Act, Cap. 113 RE 2002 (the Land Act) stipulates the nature of easement, without necessarily defining it, thus:

"(1) Subject to the provisions of this Act or any other written law applicable to the use of land, the rights capable of being created by an easement are–

(a) any right to do something over, under or upon the servient land; or

(b) any right that something should not be so done; or

(c) any right to require the occupier of servient land to do something over, under or upon that land;

(d) any right to graze stock on the servient land."

Section 145 (1) of the Land Act elaborates that the land for benefit of which any easement is created is in that Act referred to as the "dominant land" and the land of the person by whom an easement is created is referred to as "the servient land." In **Kamau v. Kamau** [1976 – 1985] 1 EA 147, a decision by the Court of Appeal of Kenya, an easement was thus simply defined as a:

"*a convenience to be exercised by one land-owner over the land of a neighbor ... The tenement to which it is attached is the dominant and the other on which it is imposed is the servient tenement.*"

Could the appellant sustain a claim of an easement over the road reserve adjacent to his shopping building such that he could restrict the first respondent's licensed use of it as a nursery? In his extensive written submissions, the appellant made factual representations and conclusions on the assumption that he had an undoubted easement over the road reserve in dispute for the benefit of his commercial building. He made no attempt to put forward a case for the legality of the alleged easement. On the other hand, the respondents contended, albeit very fleetingly, that the appellant had no exclusive right over the road reserve adjacent to his property and that he had no standing to compel the first respondent to remove his flowers and plants from the nursery.

On our part, we are firm in our minds that the appellant could not legally assert a claim of easement or right of way over the adjoining road reserve. For a road reserve is protected under section 29 (1) of the Roads Act, 2007 as an area:

> *"exclusively for the use of road development and expansion or any other road related activities."*

Logically, an owner of land adjacent to a road reserve cannot assert a claim of easement over the contiguous road reserve mainly on the reason

that an easement being a servitude over a servient land cannot attach over a road reserve whose use is expressly restricted by section 29 (1) of the Roads Act.

We are aware that notwithstanding the exclusivity of the use of the road reserve, certain temporary private uses in a road reserve can be authorized, upon application, by the road authority under section 29 (2) of that the Roads Act. That section reads:

> *"(2) Notwithstanding the provisions of subsection (1), road authority may, in writing, permit any person or authority to use the road reserve temporarily under its jurisdiction for utilities such as placing of public lighting, telegraph, adverts, telephone, electric supplies and posts, drains, sewers and mains,* ***only in cases where such use or uses do not hinder any future use of the road reserve by the road authority.*** *"* [Emphasis added]

The above provisions stipulate expressly that it is the discretion the road authority to permit or license temporary use of a part of the road reserve in cases where such use does not hinder any future statutory use of the road reserve. It seems to us untenable that the appellant herein, not

having any easement over the road reserve, could establish and assert any standing to restrict the first respondent's licensed use of the road reserve as a nursery.

Apart from failing to establish the existence of his alleged easement over the disputed area, the appellant's claim of blockage of access to the commercial building seems plainly unfounded. It is on the record that the said commercial building was easily accessible, without let or hindrance, from the main Mwanza – Musoma road and the MECCO road. This finding by the trial court was based on the evidence adduced DW1 and DW3 as well as the impressions made when the trial court visited and inspected the *locus in quo*. We see no reason to disturb this finding by the learned trial judge. If, indeed, the commercial building was inaccessible from the Mwanza – Musoma road for whatever reason, we would actually have expected the appellant to apply to the road authority under section 35 (1) of the Roads Act for a permit to construct a road of access over the road reserve lying between his building and the road. There is no indication on the record that he did so apart from his well-documented numerous engagements with the second respondent and Government functionaries at

the local and district levels to attain cessation of the first respondent's operations of the nursery.

Concluding on the first issue, we find no fault in the learned trial judge's holding that the appellant had no exclusive right over the area in dispute; and that he could not maintain an action for compensation for infringement of an easement over the disputed area. We thus find no merit in the first ground of appeal, which we dismiss hereby.

Next we consider and determine the question whether the appellant was maliciously prosecuted. In his submissions, the appellant faults the learned trial judge's three specific findings that that his prosecution by the first respondent was mounted with reasonable and probable cause; that there was no proof that the first respondent was actuated by malice in setting the legal machinery into motion; and finally, since he was discharged after the prosecution was discontinued by the DPP it could not be conclusively said that the matter ended in his favour. On the first and second findings above, the appellant countered that they were premised upon a blatant lie that he once threatened to slash the plants at the nursery and that the said threat was once reported to a local leader. He insisted that the first respondent maliciously made the accusation to the

Police against him as he lacked any factual basis to back up the allegation. As regards the third finding, he referred to a number of sources including **Clerk & Lindsell on Torts** (17th Edition), at pages 748 – 749 as well as the decision of the High Court in **Jeremiah Kamama v. Bugomola Mayandi** [1983] TLR123 and then submitted that a termination of proceedings by *nolle prosequi* was a sufficient termination of a prosecution in favour of an accused to enable him to bring an action for malicious prosecution.

The second and third respondents supported the learned trial judge's conclusion that the first respondent had reasonable and probable cause for setting the legal machinery into motion and that he was not actuated by malice as the numerous attempts by the appellant to remove the nursery raised reasonable suspicion that he was indeed the culprit that stole and destroyed the plants at the nursery. They further contended that since the appellant was discharged of the offences he could not claim that the prosecution ended in his favour.

As reiterated by this Court in **Yonah Ngassa v. Makoye Ngassa,** [2006] TLR 213, it is settled that when suing for malicious prosecution a party must prove the four ingredients: **one**, that the proceedings were

instituted or continued by the defendant; **two**, that the defendant acted without reasonable and probable cause; **three**, that the defendant acted maliciously; and **finally**, that the proceedings terminated in the plaintiff's favour. In the instant case, parties agree that the learned trial judge was correct in finding the first ingredient to have been met but they lock horns on whether the other three elements were met.

On the second element shown above, we would stress, on the authority of our decision in **James Funke Ngwagilo v. Attorney General**, [2004] TLR 161, that "it is enough if the defendant believes that there is reasonable and probable cause for the prosecution" for one to prove that there was justification for the prosecution. Certainly, the burden lay with the appellant to prove the absence of reasonable and probable cause in the prosecution. We note from the record of appeal that throughout his testimony spanning from page 105 to page 110, the appellant did not address this element. The only evidence on which to base the claim for malicious prosecution was produced rather cursory at pages 107 and 108 of the record of appeal thus:

> *"On 04.05.2010, I was apprehended by police and charged at District Court on two counts of stealing*

and damage to property. The value was TShs. 15,675,000/=. I was remanded at Butimba Prison for six (6) days until I was bailed. Judgment was delivered on 13.07.2011."

Then, he tendered a copy of proceedings in Criminal Case No. 383 of 2010 (Exhibit PE.2) but made no attempt to explain to the trial court whether the prosecution was without any probable justification. The admitted proceedings (Exhibit P.E.2) spanning over 5 pages, which we examined, have no bearing on the question at hand. On the adversary side, the first respondent's tale at page 114 of the record of appeal reveals how and why he mounted the prosecution against his opponent:

"In 2010 he [the appellant] went to the District Commissioner. ***I was not called but he informed me that I should take away the garden within 7 days. He promised to slash my trees and flowers. I reported to Street Chairman. After a few days I found all flowers were slashed.*** *It was in 2010. I reported again to the Chairman.* ***The Chairman and his team came to see the area and advised me to report to the police. I reported the same and the plaintiff was arrested.*** *Then he was sent to court by the police*

at Nyamagana District Court. The case was not heard inter partes. I sent him to court after he destroyed my properties. It was the court that decided the case. The plaintiff destroyed my properties. I filed the case for destroying my properties. ***My duty after finding that my properties were destroyed was to go to the police.***" [Emphasis added]

As rightly observed by the learned trial judge in her judgment, the appellant did not cross-examine the first respondent on the above piece of evidence. We would, therefore, agree with the learned judge's inference that the appellant's failure to cross-examine the first respondent amounted to acceptance of the truthfulness of the appellant's account. We would also add that the testimony of DW2 Hamisi Ndege Lubi, the so-called Street Chairman, substantially dovetailed with that of the first respondent on the aspect of reporting of the incident to the police.

In view of the fact that the prosecution occurred in the midst of the enduring wrangle between the appellant and the first respondent over the operations of the nursery, that the appellant strenuously made numerous well-documented attempts to cause cessation of the nursery operations and that at some point he threatened to destroy the nursery, any

reasonable and objective person would think that there was a reasonable and probable cause for prosecuting the appellant. It is significant that on the evidence on the record, the first respondent's version stands unassailable.

Next, we consider the element of malice. The appellant contended that the first respondent was actuated by malice when he set the legal machinery into motion. In **James Funke Ngwagilo** (supra), this Court defined malice thus:

> *"Malice in the context of malicious prosecution is* ***an intent to use the legal process for some other than its legally appointed and appropriate purpose****. The appellant could prove malice by showing, for instance, that the prosecution did not honestly believe in the case which they were making, that there was no evidence at all upon which a reasonable tribunal could convict, that the prosecution was mounted for a wrong motive and show that motive."* [Emphasis added]

In the instant case, the evidence on the record that we have reviewed earlier on how and why the prosecution against the appellant was mounted is a far cry from proof that the prosecution was instituted for a

purpose other finding and punishing the culprit that stole and destroyed plants at the nursery. The fact the appellant had threatened to remove or slash the plants should the nursery operations not ceased was an obvious basis for apprehending and investigating him as a suspect.

The appellant may have been prosecuted by the first respondent and subsequently discharged upon the DPP entering *nolle prosequi*, but we have no cause to differ with the High Court that there was no proof that the first respondent set the legal machinery against the appellant without reasonable and probable cause or that he was actuated by malice. Accordingly, we agree with the High Court's holding that the claim for malicious prosecution was without merit and so, we dismiss the second ground of appeal.

In view of our determination on the first and second grounds of appeal against the appellant, the third ground of appeal is naturally rendered without substance. In consequence, we dismiss it as well.

By way of a postscript, however, we feel obliged to observe that this case has highlighted the sensitivity of issuance of permits by the road authority under section 29 (2) of the Roads Act for temporary private uses

of the road reserve. We would enjoin the authority responsible for the supervision and management of roads to adopt a mechanism that would ensure that licensed activities on a road reserve are not incompatible with the uses of adjoining land. To avoid unnecessary frictions and tensions in the society, it would undoubtedly be prudent to adopt a consultative approach involving all persons whose interests could be affected before permits are granted or renewed over a part of a road reserve.

In the final analysis, the entire appeal is destitute of merits. We thus dismiss it with costs.

DATED at **MWANZA** this 8th day of October, 2018.

I. H. JUMA
CHIEF JUSTICE

S. E. A. MUGASHA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

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

S. J. Kainda
DEPUTY REGISTRAR
COURT OF APPEAL