IN THE HIGH COURT OF TANZANIA

AT IRINGA

(DC) CIVIL APPEAL NO. 5 OF 2011

Originating from Civil Case No. 4 of 2008 at Iringa Rm's Court

DR. OMARY LUSHINO ..... APPELLANT

VERSUS

IRINGA URBAN WATER SUPPLY &
SEWARAGE AUTHORITY ..... RESPONDENT

JUDGMENT

MKUYE,J

The appellant, Dr. Omary Lushino having been aggrieved by the decision of the Resident Magistrate in the Resident Magistrates' Court of Iringa at Iringa, filed an appeal to this court with three grounds of appeal which are: **One,** that in view of the abundant evidence on record establishing trespass *ab initio* to the appellants property by the respondents' servants and also false attribution of criminality upon the appellant, the trial magistrate erred in law when he failed to award

general damages to the appellant. **Two**, that the trial magistrate erred in law when he failed to award special damages which were specifically pleaded and proved by the appellant. **Three,** that the suit before the lower court not being a suit against the Government, the trial magistrate erred in law in holding that the Attorney General had the necessary *locus standi* to represent the respondent in the matter before him.

While the appellant was represented by Mr. Mkwata learned counsel, the respondent was represented by Mr. Maganda and Mr. Mwita learned state attorneys. By consent from both parties it was agreed that the appeal be argued by way of written submissions.

Mr. Mkwata learned advocate opted to argue on the first and second grounds of appeal and, hence, abandoned the third ground. In his length submission, among other things, the learned counsel contented that, in view of the abundant evidence on record proving the tort of trespass abinitio to the appellants' residential premises by the respondents' servants and false attribution of criminality upon the appellant, the trial magistrate erred in law when he failed to award to the appellant in general damages. He contented that the evidence on record revealed that on two consecutive dates i.e. 13th and 14th November 2007 about six (6) people who were respondents' servants while labouring under strong belief that the appellant had illegally diverted water supply into his residential premises from their source of

supply through dubious connection had stormed into his premises with an intention of proving true their belief.

That, in their efforts to trace the believed illegal connection, the respondents' servants caused defects to the ceiling in the sitting room, corridor and one of the self contained bedrooms; cracks to the wall and damage to the foundation, the courtyard and to electrical works. That on the basis of the evidence on record the trial magistrate appreciated that the respondents' entry upon the appellants' premises constitute trespass *ab initio.*

Mr. Mkwata goes further to submit that, at law trespass is actionable per se i.e. whether or not the plaintiff has actually suffered any damage. He also cited the case of **Frank S. Machuma V Shaibu A. Shemndolwa (1998) TLR 278 i**n which the court held that "trespass *is actionable per se, without proof of actual loss or damage; in this case, therefore, the plaintiff is entiled to general damages.*

Mr. Mkwata submitted further that despite the fact that the trial magistrate was satisfied that the respondent were liable for trespass and despite the legal position that trespass is actionable per se, the trial magistrate refused to award the appellant any general damages on highly incomprehensible ground.

The learned counsel submitted further that it was a total misdirection on the part of the trial magistrate to award the amount of Tshs. 2,000,000/= which indeed had nothing to do with a claim of general damages. That, the appellant had also claimed for payment of general damages on account of suffering general reputation harm in his community and on being exposed to hatred, contempt and ridicule.

That at the scene, the respondents' servants while nursuing a strong belief that the appellant was stealing their water went ahead inviting the street chairman to witness the stealing. That, the invitation did not end up to the street chairman but to other people. That, the said two days search exercise did not reveal any illegal connection and yet this information was not conveyed to the people they had invited to witness theft of water.

The learned counsel for appellant continued to argue that the respondent had also gone further to report the appellant to the police on the allegation of stealing their water. That, following this report the appellant was on 16/9/2008 arrested by the police and was put under custody. The event took place even after the respondent had made a written apology to the appellant. The report was also made to the police after the instant suit had been instituted in court.

The learned advocate submitted further that had the trial magistrate given judicial consideration to the fact that respondent was

liable for trespass which not only caused physical damage to the appellants' premises but also it caused reputation harm to the appellant and the fact that the respondent had falsely attributed criminality to the appellant by reporting him to the hounds of justice while being aware that he was innocent, he could not have failed to award general damages to the appellant.

With regard to the second ground of appeal, the learned counsel for appellant submitted and faulted the trial magistrate for failing to award special damages which were specifically pleaded and proved by the appellant. He submitted that the law regarding claim of special damages demands that they must be specifically pleaded and strictly proved. To substantiate his argument he cited the cases of **Bamprass Star Service Station Ltd V Mrs Mwale (2000) TLR 390 and Tanzania Saruji Corporation V African Marble Co. Ltd (2004) TLR 155**. He reiterated that the appellant discharged his legal obligation under this requirement by pleading specifically a claim of Tshs 9.605,190/= as special damages and furnished particulars supporting this claim.

He went further to fault the trial magistrate that he deliberately failed to analyse the evidence in support of the claim and in lieu of it he engaged himself into speculations and come out with the award of shs. 2,000,000/=.

The learned counsel lastly as contented that, since the trial magistrate had assessed a sum of Tshs. 2,000,000/= as compensation for damage caused in one room and since the evidence on record shows that the places damaged consisted five areas, it follows therefore that had he taken into consideration those areas he could have found that the amount of Tshs. 9,631,140/= claimed by the appellant was not only proved but it was also reasonable. He therefore prayed this court to allow the appeal with costs.

For the respondent, Mr. Alex Mwita learned state attorney in unequal force entered a length reply and submitted that the respondents' servants were not acting on strong belief that the appellant had illegally diverted water into his residential premises. To the contrary, the respondents' servants were acting in conformity with section 9 of the Water Works Act, Cap 272, R.E. 2002. Basing on the cited provisions of the law the inspection of the said illegal water supply by the respondents' servants into the appellants' premises was statutorily authorized.

That, the said inspection was done after the appellants' failure to give sufficient explaination about the source of water supply found overflowing in the tanks and water emanating from the taps with high pressure while the water supply to the appellants' premises was disconnected about three months ago.

The learned state attorney, Mr. Mwita contented further that trespass is actionable per se without proof of actual loss or damage, however, he strongly submitted that the said position does not guarantee the appellant that he is entitled to general damages since the cause of action is one thing and proving that cause of action in the balance of probability is another thing. That, the appellant during trial did not prove his case in the balance of probability but to the contrary it was the respondent who actually proved that the appellant was entitled to the sum of shs. 2,000,000/= as specific damage.

The learned state attorney cemented his submission by relying on the case of **Zuberi Augustino V Anicet Mugabe (1992) TLR 1783 CA** where it was held:

> *"It is trite law that specific damages must be specifically pleaded and proved"*

He went on to say that the appellant had specifically pleaded but failed to prove special damages as submitted.

Mr. Mwita learned state attorney contented further that the whole exercise of inspecting the premises was done under statutory authority and was consented by both parties. That the inspection was done after illegal connection was done by the appellant to his premises while water supply was already disconnected to the appellants'

premises three months earlier and thus, the appellant cannot benefit from his own wrong.

With regard to the claim of general damages the learned state attorney submitted that failure by the court to award it to the appellant was due to the fact that the same is awarded subject to the discretion of the court.

On the issue of lowering of appellants' reputation, the learned state attorney submitted that the inspection was executed by the respondent in accordance with the law and therefore there was no harm to the appellants' reputation. He submitted further that no words or act was published in respect of the alleged inspection, and inspection was done due to the appellants' wrong, so he cannot benefit from his own wrong. The learned counsel fortified his submission by the celebrated authority of **Tanzania China Friendship Ltd V Our Lady, the Usambara Sisters (CAT) Civil Appeal No. 84 of 2004** with its proper citation (**2006) TLR 70** which held that *"general damages are awarded upon discretion of the court".*

The learned state attorney went further to argue that the appellant in his pleadings pleaded the sum of Tshs. 90,000,000/= as general damages for the act done by the respondents' servants. This amount, he argued, was erroneously pleaded due to the fact that,

there were no facts which showed to what extent the appellant suffered general damages.

On the second ground of appeal, it was Mr. Mwitas' submission that the appellant had specifically pleaded special damages but he failed to prove it and that the respondent proved that the appellant is entitled to the sum of Tshs. 2,000,000/ as special damages. He fortified his argument by citing the case of **Bolag V Hutchson (1950) AC 515 at page 525** as cited in the case of **Stanbic Bank Tanzania Ltd V Abercombie & Kent (T) Ltd Civil Appeal No. 21 of 2001** in which Lord Mc Naghten stated that:

> *"Special damages are .... such as the law will not infer from the nature of the act they not follow in the ordinary course. They are exceptional in their character and therefore they must be claimed specifically and proved strictly."*

He reiterated that he appellant was supposed to prove his claim unlike the respondent who helped to prove his case.

Lastly, Mr. Mwita, learned state attorney submitted that damages will generally be awarded only where there is a clear chain of causation, linking the negligent act or breach of statutory duty to loss

or harm suffered. He therefore prayed to the court to dismiss the appeal with costs.

In rejoinder, Mr. Mkwata learned counsel for appellant submitted that it seems the learned counsel for respondent failed to appreciate what the term trespass *ab initio* means in tort and also what was decided by the lower court. That the lower court was satisfied that although the respondents' servants act of entering into the appellant premises was sanctioned by law but their subsequent wrongful acts abused that privilege and accordingly the trial magistrate held the respondent liable for trespass *ab initio*. That there was no appeal from the respondent against that finding.

Mr. Mkwata contented further that, that the inspection was consented to by the parties also collapse like a house of cards. That the argument that the appellant cannot benefit from his own wrong is also misplaced because no any wrong was unearthed through the fateful inspection against the appellant. That, the central issue to be ascertained is the failure by the trial magistrate to exercise that discretion judicially. The learned counsel maintained that the appellant had specifically claimed special damages and had strictly proved the same accordingly .

The central issues for determination is whether the evidence adduced in support of the claims of trespass *ab initio* and defamation

substantiates the tort of defamation and the pleaded specific an d general damages.

Trespass *ab initio* is among the tortuous liability which is expounded by the distinguished authors including **W.W.H. Rogers Winfield and Jolowic on Tort, 13th Ed Sweet and Maxwell, London, 1989 at pg 369** where he stated that:

> *"where an entry upon the land or other prima facie trespass is justified by the authority of itself, then, according to an ancient doctrine of the common law, if the action abused his authority he becomes a trespasser ab initio, his act is reckoned as unlawful from the very beginning, however, innocent his conduct may have been up to the moment of the abused."*

Based on the above proposition, I am without flicker of doubt that the tort of trespass ab inition is presumed to have been committed when the defendant, who by virtue of statutory authorization or provisions of the law enters into ones' premises and executes the purported tasks therein but in excess of the demarcation of the provision of the law or legislation.

Going by the court record and submissions of learned counsel in support of appeal, I find that the respondent entered in the premises

of the appellant and executed some tasks therein. The respondent, however, made reliance section 9 of the Water Works Act to justify their entry and tasks performed therein. The section interlia provides:

"9(1) The Water Authority may for any of the purposes mentioned under this section at any time between 6 a.m and 6p.m, or in the case of urgency at any other time enter upon any premises into, upon or under which any pipe or fitting connected with the water works is or is being fixed-

(a) to inspect any such pipe or fitting laid or fixed or being laid or fixed to ascertain whether there is or is likely to be any waste leakage, obstruction, damages, pollution or misuse of water in connection therewith and to ascertain whether such pipe or fitting complies with the terms of any rules of any rules made under this Act;

(b) to fix, inspect, read, check, clean or remove or replace any meter, or similar appliance of the Water Authority used or to be used in connection with the supply;

(c) to disconnect the supply of water from any premises or diminish, withhold or divert the supply of water through or by means of any pipe or fitting wholly or in part".

It is without question that the cited provision of the law empowered the respondent to enter into the premises of the appellant at any time for the purposes of furnishing certain tasks. Lucky enough the law specifies the tasks to which the respondent was required to perform/execute . And for that matter entry was lawful if the respondent entered into the premises to discharge such functions as inspecting pipes or fittings; fixing, reading, checking, cleaning, removing or replacing meters or other similar appliances of Water Authority; and/or disconnecting, diminishing, withholding or diverting the water supply. The respondent is precluded from acting contrary to the laid down factions.

According to the court record as per testimony of PW1, one day the respondents' servants entered into his premises for the purpose of inspecting water connection. They did it through digging up. That in the course of the said inspection, they broke the ceiling board of the sitting room, they disconnected electric wires, they dug around the appellants' fence, the fact that caused the walls of the house to develop cracks and damaged the underground water tank to the extent that it failed to store water. This testimony was not countered by the respondent's servants. The fact that the respondent admitted to have caused damage to the appellants' premises proves that they contravened the provisions of the law and thus they became trespassers *ab initio* as was stated by **W..W.H. Rogers (Supra**).

It should be noted that the lower court appreciated that the respondent's servants destroyed the property of the plaintiff, that is why it ordered the respondent to compensate the appellant the sum of shs. 2,000,000/=. It may not be insignificant to mention here that even the respondent in away conceded this in their submission that " the appellant during the trial did not prove his case upon the balance of probability, to the contrary it was the respondent who actually proved that the appellant is only entitled to the sum of Tshs. 2,000,000/= as specific damages. It confirms that the respondents servants were trespassers *ab inition.*

The next question to be considered is defamation. It was the appellants' claim that the respondents' servants did not only enter into his premises unlawfully but they also defamed him. But perhaps one would ask as to what is defamation. According to **Rogers (Supra)** at pg 294:

> *"Defamation is the publication of a statement which reflects on a person's reputation and tends to lower him in the estimation of right thinking members of society generally or tends to make them shun or avoid him"*

It is a communication that injurs/harms the reputation of another so as to lower him in the opinion of the community or to deter third

persons from associating or dealing with him. Defamation is two folded. That is Libel and Slander. *"A libel is a defamatory imputation made in permanent form, such as in writing while slander is a defamatory imputation made in a fugitive form such as by speaking or gestures."*

In an action for slander there is a need for proof of actual damage suffered (**See Professor Ibrahim Haruna Lipumba V Zuberi Juma Mzee (2004) TLR 381).**

The issue here is whether the appellant was defamed by the respondent.

During trial it was the testimony of PW1 that the respondents' servants stated before his guest (who incidentally did not testify in court) that he (PW1) was a thief as he had illegally connected water supply. He said that, that statement lowered his reputation before his guest who at that time was present. PW1 testified further that the defamatory words went as far as to other people including those who had been medically treated by him. But again none of the said patients were called to testify in court to that effect.

Therefore no evidence from the alleged visitor or patients allegedly treated by appellant to whom his reputation could have been

lowered was fielded in court. It means, the extent to which the information that he was stealing water circulated is unknown. Failure to bring the alleged guest and the patients allegedly treated at his hospital had denied the trial court vital information which could have enabled it to assess the harm and calculate the damages payable to him. As such, as there is no evidence to show how PW1 was defamed to his guest and patients, I do not see and do not accept the allegation that the appellants' reputation was lowered to his guest or other people who were treated at his hospital. At most the evidence to that effect was a hearsay evidence with no evidential value.

But again PW1 testified that his reputation was lowered by the respondents' act to report him to the police station on the allegation of stealing water whereupon he was put under custody and interrogation. This fact was incidentally admitted by Gilbert Kayanga (PW3) in that they had reported the appellant to the police on suspicion that he was stealing water. I find this to be ridiculous for two reasons. **One,** the respondent's servants who participated in the operation of inspecting the appellants' premises told the court that they did not detect any illegal connection. That was on 13th -14th November 2007. **Two,** according to PW1's evidence which was not controverted, he was reported to the police on 16/9/2008, which was after almost nine months thereafter. No explaination has been advanced by the respondent as to whether that was a second suspicion or a continuation of the first suspicion. All in all, the respondents' act of reporting the appellant to the police imputed that he committed a criminal offence which was actionable parse. Thus,

there was no need of proof of actual damages (**See Professor Ibrahim Lipumbas' case (Supra**). As such I accept that the respondents' act of reporting appellant to the police constituted defamation on the appellant.

PW3 also testified that on the fateful date he saw many people gathered around the appellants' premises peeping through "michongoma" fence. That when he asked them as to what transpired, they informed him that, there were some people from Iringa Water Supply who were inspecting the appellants' premises for allegedly illegal connection of water supply. PW3 said he got surprised to hear such a story because he was among persons who initially respected the appellant; and following that incident he ceased to respect him. The respondents' counsel is, however, of the view that what the respondent did was not published.

On my part, after examining the evidence and submissions made on this aspect I would accept that his reputation was lowered to PW3 becaused he witnessed when the inspection was conducted into appellants' premises. He said he saw many people peeping through appellant's premises fence. He did not, however, give an estimation of how many people were there. Neither did he give explaination as to how other people disrespected the appellant after the incidence. This in my view shows that the defamation circulation was very minimal and thus the injury to appellants' reputation was also nominal in as far as this piece of evidence is concerned.

The last sub issue to be determined is that of specific damages which was pleaded by the appellant but allegedly was not satisfactory dealt with by the trial court. It is gathered from the trial courts' record that the appellant tendered an exhibit which among other things substantiated the damages suffered following the unlawful destruction of his property. The Tax Invoice was tendered and admitted in court as Exh. P4. The learned trial magistrate however ordered the appellant to be paid specific damages to the tune of Tshs. 2,000,000/= on the basis of the Valuation Report prepared by DW6 Property Market Consult Ltd.

I had an opportunity of looking at Exh.D4 which is the Tax Invoice prepared by PW2 addressed to PW1 and the Valuation Report (Exh. D1). Exh. P4 is a claim for rehabilitation of residential house of Dr. Lushino (PW1) whose contents according to PW2 could differ. It is in a contractual form between the maker and the addressee. Exh. D1 is a report which gives details of the damage including photographs and how the amount required for repair is reached. To my understanding while Exh. P4 tends to bind the maker and the owner of the house, Exh. D1 can be used by a third party. I think mere showing a claim of shs. 9,631,140 for repair of the premises in question was not sufficient to prove the extent to which the house in question was damaged to require such amount of money for repair. More detailed analysis was required of which I think was shown in Exh. D1.

In view of the above, I think the appellant failed to prove the specific damages to the tune of shs. 9,631,140/= instead I am like the trial court satisfied that special damages of shs. 2,000,000/= was proved and the same is upheld.

Generally speaking, the purpose of damages for defamation is to provide compensation for damages done to ones' reputation, to vindicate one's good name, to take into account of the distress, hut and humiliation suffered out of the defamation caused. Factors which may be considered in awarding damages for defamation include the gravity of defamation suffered, personal integrity, professional reputation honour etc and the extent to which defamation has circulated. (**See Professor Ibrahim Lipumba V Zuberi Juma Mzee (2004) TLR 381 at page 388** when the court of appeal sought inspiration from the case of **John V MGN Ltd (1996) 2 All ER 35).**

I have already stated that trespass is actionable per se. Thus no proof of actual damage is required. Also defamation in the category of slander ordinarily is not actionable perse, but it becomes actionable perse without requiring the proof of actual or specific damages where it imputes commission of a criminal offence (**See Professor Ibrahim Lipumba's Case (Supra**). I have already ruled out that the fact that the respondent reported the appellant to the police on suspicion of stealing water was an imputation of the commission of a criminal offence of which the appellant did not need to prove actual damages.

The learned state attorney Mr. Mwita has submitted that the general damages was erroneously pleaded as there was no evidence to show that the appellant suffered general damages. But in my considered view I am not in total agreement with him since according to what I have demonstrated the appellant was able to bring some facts which revealed that he had suffered general damages ie. The evidence of PW3 and the respondents act to report him to the police station. Even in the question of trespass which was actionable per se what was required of him was to establish a prima facie case but it was not a requirement to him to show the extent of general damages he suffered.

In view of what I have demonstrated hereinabove I think that the respondents acts against the appellant caused injury to the appellants' reputation. In the result I order the respondent to pay the appellant Tshs. 20 million as general damages. Costs to follow the event.

Ordered accordingly.

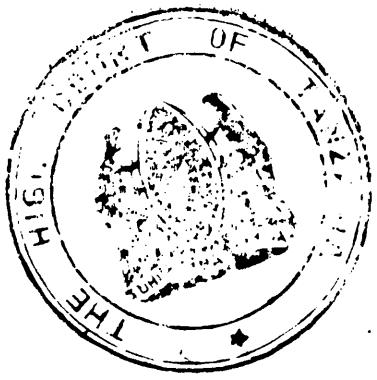
R.K.MKUYE

JUDGE

30/5/2013

Right of appeal is explained.

Delivered on this 30th day of May, 2013 in the presence of Dr. Lushino, the appellant, Mr. Mkwata learned advocate for appellant and Mr. Mwita learned counsel for the respondent.



R.K.MKUYE

JUDGE

30/5/2013