

**IN THE HIGH COURT OF TANZANIA**

**(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**CIVIL CASE NO. 192 OF 2011**

**HAMIDA HAMISI.....PLAINTIFF**

**VERSUS**

**THE PRINCIPAL MAGISTRATE OF**

**MBAGALA PRIMARY COURT .....1<sup>ST</sup> DEFENDANT**

**HAMISA SALUM UBUGUYU.....2<sup>ND</sup> DEFENDANT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT**

*14/12/2017&23/02/2018*

**JUDGMENT**

**MWANDAMBO, J:-**

This is a suit for damages against the Defendants for the alleged misfeasance claimed to have been committed by the 1<sup>st</sup> Defendant in collusion with the 2<sup>nd</sup> Defendant in execution of a judgment of the Primary Court of Mbagala in case No. 112 of 2005. The suit is strongly resisted by all Defendants.

The facts leading to the suit are as follows. The 2<sup>nd</sup> Defendant successfully sued the Plaintiff before the Primary Court at Mbagala in case No. 112 of 2005. The said suit was recovery of Tshs. 1,132,600/= but the said court adjudged the Plaintiff to pay Tshs. 883,000/= in a judgment delivered on 21 July 2006. The Plaintiff's attempt to challenge that judgment ended in vain for her appeal to the District Court of Temeke in civil appeal No. 20 of 2007 was dismissed thereby upholding the judgment of the trial primary court.

Subsequently, Kam Commercial Services attached the Plaintiff's house No. 0033 Mbagala kuu in execution of a decree for Tshs 16,417,722/= and the said house was eventually sold whereby Sameer Sadiq Mohamed emerged the successful purchaser. The sale was followed by a proclamation of sale and thereafter the purchaser gained possession after a forceful eviction of the tenants therein who included PW3. Following the sale, the 2<sup>nd</sup> Defendant (decree holder) parted with Tshs. 16,417,722/= out of a decree for Tshs. 883,000/= per judgment of the Primary Court. In protest against the eviction, the Plaintiff has instituted the instant suit against the 1<sup>st</sup> Defendant for the alleged abuse of power in allowing execution of a decree which was at variance with the judgment in case No. 112 of 2005.

As against the 2<sup>nd</sup> Defendant the Plaintiff states at para 18 of the amended plaint as follows:

*"That, the 2<sup>nd</sup> Defendant is equally liable for abetting the said tortious acts of the 1<sup>st</sup> defendant since she knowingly and for her own ends induced the 1<sup>st</sup> defendant the actionable act, to wit misfeasance in public office, and who is liable by liability abetment."*

Arising from the forgoing the Plaintiff prays for judgment and decree against the Defendants for Tshs. 200,000,000/= damages for misfeasance in public office to be paid by the Government, Tshs. 100,000,000/= damages for liability by abatement payable by the 2<sup>nd</sup> Defendant, interest, costs and any other reliefs.

Not amused, the Defendants deny any liability to the Plaintiff. Specifically, the 2<sup>nd</sup> Defendant distances herself from any wrong doing in the execution of a decree lawfully passed in her favour by Mbagala Primary Court and prays for the

dismissed of the suit. Before the commencement of the hearing, the court framed the following issues:-

- 1. Whether the Plaintiff's eviction from the house No. 0033 Mbagala Kuu was a result of any wrongful and/or fraudulent order by the first defendant.*
- 2. Whether the Plaintiff has any cause of action against the 2<sup>nd</sup> Defendant*
- 3. Whether the Plaintiff suffered any damages as a result of any wrongful acts of the Defendants (if any).*
- 4. What reliefs are the parties entitled to.*

The Plaintiff prosecuted her claim in person. Besides her own evidence, which was by and large a chronology of events narrated in the amended plaint, she called two more witnesses namely; Azizi Mohamed Omari (PW2) and Primus Kiiza (PW3). PW2 introduced himself as Plaintiff's husband whose evidence was essentially a repeat of what PW1 had stated in her evidence. PW3 was a tenant in the Plaintiff's house attached and sold in execution of a decree at the instance of the 2<sup>nd</sup> Defendant. This witness testified on how he became aware of the case against the Plaintiff instituted by the 2<sup>nd</sup> Defendant and how he and his fellow tenants were evicted by force from the Plaintiff's house No. 0033 Mbagala kuu. Subsequent to the impugned eviction, PW3 facilitated the Plaintiff with institution of the suit by accompanying her to a lawyer. Apart from the oral evidence, the Plaintiff tendered a number of exhibits in an attempt to prove her case namely; a certified copy of judgment of the Primary Court in case No. 112 of 2005 (exhibit P1), Notice to pay the decretal amount and warrant of attachment (exhibit P2 collectively) warrant of sale dated 15 July, 2008 (Exhibit P3), Notice from Sameer Sadiq (exhibit P4). In cross-examination, PW1 was forced to tender a letter from the Registrar of the High Court dated 07 May, 2013 (exhibit D1). With that testimony, the Plaintiff closed her case and prayed for judgment for reliefs set out in the amended plaint.

Fatuma Hamisi Mgendwa (DW1) was a Primary Court Magistrate in charge of Mbagala Primary Court testified on behalf of the first and 3<sup>rd</sup> Defendants. PW1's duties included hearing of cases and supervision of execution of decrees. Although she became the Primary Court Magistrate In-charge of Mbagala Primary Court post the judgment, she confirmed the existence of a judgment in case No. 112 of 2005 through perusal from case files. DW1 denied having seen any letter from the decree holder (2<sup>nd</sup> Defendant) applying for execution according to the procedure obtaining in such instances. It was her evidence that since the decree holder (2<sup>nd</sup> Defendant) her court never dealt with any execution of the decree and the document titled ***Hati ya kukamata mali kwa kutimiza Hukumu*** (exh. P2) was not issued by her court. In any case DW1 stated, document was a forgery because the amount shown as a decretal sum was at variance with the judgment by which the Plaintiff was required to pay to the 2<sup>nd</sup> Defendant Tshs. 883,000/= compared to Tshs. 16,417,722/= appearing in exhibit P2. DW1 denied the existence of any document by way exh. P2 in the court file. According to her, had there been any application for execution of the judgment by way of attachment and sale of the judgment debtor's property, the Primary Court had no power to appoint a court broker rather make a written request to the District Court Magistrate incharge for appointment of a Court Broker as is ordinarily the case. Commenting on the warrant of sale of property (exhibit P3), DW1 stated that the name of the Magistrate who signed it was lacking neither did she come across any such document in the case court file in her office. It was DW1's further evidence that licensing of Court Brokers for execution of court decrees is done by the Registrar of the High Court and that according to exh. D1, Kam Commercial Services said to have been appointed to execute the decree was not one of the licenced Court Brokers and so the District Court Magistrate in- charge could not have appointed an unlicensed person to

execute the decree. With that evidence DW1 denied any wrong doing in the attachment of the Plaintiff's house and prayed for the dismissal of the suit against the 1<sup>st</sup> and 3<sup>rd</sup> Defendants.

Hamisa Salum Ubuguyu (DW2), the second Defendant was the last defence witness who adduced her evidence led by Ms. Proscovia learned Advocate. Her evidence was to the effect that she was a successful party in case No. 112 of 2005 against the Plaintiff who lost again on appeal to the District Court in Civil Appeal No. 20 of 2007 before M. S Mnzava, PDM in a judgment delivered on 31 December 2007. A certified copy of the judgment in appeal 2007 before M. S Mnzava, PDM delivered on 31 December 2008 was admitted as exh. D2. It was her testimony that following the dismissal of the Plaintiff's appeal she went back to the District Court for enforcement of her decree and the presiding Magistrate in appeal assisted her by facilitating the process which entailed filling in execution forms followed by payment of the necessary fees. After that process, DW2 stated that the District Court Magistrate advised her to go back to Mbagala Primary Court where she met a Magistrate called Kioja different from the trial Magistrate who asked her to provide a telephone contact number and advised her to leave waiting for a call on payment of the decretal sum.

It was DW2's further testimony that on 29 August, 2008, she went to Mbagala Primary Court in response to a call from the Primary Court Magistrate in charge who gave her Tshs. 16,417,722/= cash in her office as her entitlement from the decree and left. Apart from admitting payment of a sum far above the decretal amount in case No. 112 of 2005, DW2 told the Court that she never filled the execution forms herself rather, it was the District Court officers before which she lodged an application for execution and paid the requisite fees. DW2 distanced herself from exh. P2 and P3 which she claimed not to have seen any time before. Whilst admitting that apart from the decree for Tshs 883,000/=

passed by the Primary Court in case No. 112 of 2005, she contended that the amount she was ultimately paid included interest computed by the officers of the District Court.

Answering questions from the Court DW2 admitted to have provided the particulars of the Plaintiff's property for attachment before the Primary Court Magistrate incharge at Mbagala. All in all DW2 denied having done anything wrong other than pursuing her lawful entitlement from the decree in case No. 112 of 2005 and prayed for the dismissed of the suit. DW2's evidence marked the end of the trial paving a way to closing submissions which were made in writing. I will highlight the substance of the submissions hereunder.

The first issue seeks to investigate whether the eviction of the Plaintiff from her house No. 0033 Mbagala Kuu was a result of any wrongful and/or fraudulent order by the 1<sup>st</sup> Defendant. Ms. Grace Lupondo, learned State Attorney invited the Court to answer the issue negatively because the Plaintiff has failed to discharge her burden of proof as required of her by sections 110(1) and (2) and 111 of the Evidence Act, Cap [RE 2002]. In amplification, the learned State Attorney argued that apart from the judgment of the Primary Court in case No. 112 of 2005 (Exh. P1) the rest of the documents relied upon by the Plaintiff did not originate from the 1<sup>st</sup> Defendant as testified by DW1 and for that reason she urged the Court to find and hold that the 1<sup>st</sup> Defendant's hands were clean and thus the Plaintiff's claim should fail. The learned Advocate for the 2<sup>nd</sup> Defendant submitted in defence of the genuineness of the documents leading to the attachment and sale of the Plaintiff's house. The learned Advocate argued that the said documents namely; exhibits P2 and P3 were validly issued by the 1<sup>st</sup> Defendant and if there was any forgery in any of them there was no evidence on the required standard to prove not only the forgery but also the perpetrator of it. In support of the argument, the learned Advocate sought refuge from

**Hidaya Ilanga v. Manyama Manyoka** [1961] EA 705 for the proposition that in all cases where an allegation is made in civil cases akin to a crime such as fraud, proof must be more than mere balance probabilities. A similar reference was made to **Omary Yusufu V. Rahma Ahmed Abdulkadr** [1987] TLR 169 on the extent of proof required in cases where a party in civil proceedings makes allegation that someone has committed a crime. It was thus her submission that the Plaintiff has not led sufficient evidence to prove forgery against the 1<sup>st</sup> Defendant in relation to the eviction from her house and so the Court ought to answer the first issue in the negative.

The Plaintiff who had no legal representation urged the court to determine the first issue in her favour. According to her, there was strong evidence to prove that the eviction from her house No. 0033 Mbagala Kuu was a result of wrongful and fraudulent order by the 1<sup>st</sup> Defendant. The Plaintiff strongly submitted that exhibits P2 and P3 proved her case to the required standard that the 1<sup>st</sup> Defendant made wrongful and fraudulent orders whilst at the same time arguing that the documents were forgeries and not part of Primary Court's record in case No. 112 of 2005.

Having summarized the evidence and arguments for and against, I now turn my attention to the discussion of the first issue. It is clear from the pleadings that the Plaintiff's suit is founded on the tort of misfeasance in public office. The term misfeasance is defined by Black's Law Dictionary as follows:

***"... a lawful act performed in a wrongful manner 2 more broadly a transgression or trespass."***

Misfeasance in Public office is defined thus:-

***"The act of excessive malicious or negligent exercise of statutory power by a Public Officer...."***

See: *Black's Law Dictionary 8<sup>th</sup> Edition by Brian A. Garner at page 1021.*

My research on authorities on the subject has landed me to an English case in **Three Rivers District Council and others v Bank of England (No 3)** [1996] 3 All ER 558 in which Clarke, J held inter alia from the head note at page 558:

*"The tort of misfeasance in public office was concerned with a deliberate and dishonest wrongful abuse of the powers given to a public officer and the purpose of the tort was to provide compensation for those who suffered loss as a result of improper abuse of power. It was not to be equated with torts based on an intention to injure, although it had some similarities to them. **The tort could be established in two alternative ways: (a) where a public officer performed or omitted to perform an act with the object of injuring the Plaintiff (i.e. where there was targeted malice); and (b) where he performed an act which he knew he had no power to perform and which he knew would injure the Plaintiff.** Accordingly, malice, in the sense of an intention to injure the Plaintiff or a person in a class of which the Plaintiff was a member, and knowledge by the officer both that he had no power to do the act complained of and that the act or omission would probably (but not that it would necessarily or inevitably) injure the Plaintiff or such a person, were alternative, not cumulative, ingredients of the tort. ...."* (emphasis added)

That decision was approved by the House of Lords on a further appeal from the Court of Appeal which had upheld the High Court decision. The House of Lords expressed itself in **Three Rivers District Council and others v Bank of England (No 3)** [2000] All ER 1 inter alia:

*"...The tort of misfeasance in public office had two forms, namely (i) cases where a public power was exercised for an improper purpose with the specific intention of injuring a person or persons, and (ii) cases where a public officer acted in the knowledge that he had no power to do the act complained of and that it would probably injure the claimant. In the second category of cases, an act performed in reckless indifference as to the outcome was sufficient to ground the tort. Recklessness in that sense was subjective recklessness, and thus the claimant had to prove that the public officer acted with a state of mind of reckless indifference to the illegality of his act..." (emphasis added at page 1).*

Applying the foregoing to the instant case, to succeed, the Plaintiff must prove that the 1<sup>st</sup> Defendant exercised his power in execution of the decree in Case No 112 of 2005 for an improper purpose with the specific intention of causing injury to the Plaintiff. There is no dispute in this suit that the Plaintiff was evicted from her house No. 0033 Mbagala Kuu purportedly as a result of execution of a decree in case No. 112 of 2005 in which the 2<sup>nd</sup> Defendant obtained a judgment for Tshs. 883,000/= against the Plaintiff. The evidence of DW1 which was not controverted shows clearly that: One, the 2<sup>nd</sup> Defendant never applied for execution of the decree in her favour in case No. 112 of 2005 which would have resulted in the trial Court summoning parties for that purpose. Indeed, as the record will show through exhibits P2 and P3, the said execution

was carried out as a result of a decree of the Primary court issued on 3 June 2008 in case No. 112 of 2005. However, it is clear from exhibit P1 that there is no other decree of the Primary court involving the Plaintiff and the second Defendant is than the one entered on 21 September 2006 through exh. P1. That decree was a subject of an appeal in civil appeal No. 20 of 2007 which was determined against the Plaintiff on 31 December 2007. Two, the Primary Court never issued any document by way of **Hati ya kukamata mali kwa kutimiza hukumu** (exh. P2) on the dates indicated or at all. Three, exhibit P2 shows the decretal sum to be Tshs. 16,417,722/= which is different from the judgment of the Primary Court which ordered the Plaintiff to pay the 2<sup>nd</sup> Defendant Tshs. 883,000/=. Four, the court Broker by the name of Kam Commercial Services ordered to execute a decree against the Plaintiff was directed was not appointed by the District Court Magistrate in-charge upon a written request by the Primary Court. A closer look at the said warrant of attachment in execution of judgment (MCA/65) reveals some interesting features and I propose to cite just a few of them. Although the warrant purports to have been issued to command the *court broker* to demand payment of the amount stated from the Plaintiff, that same amount is indicated to have been paid. It is equally clear from the said warrant that it was made by Temeke Primary Court Magistrate but stamped with rubber stamps of Mbagala Primary Court. The two features speak louder about the genuineness of the said warrant. At any rate, as stated by DW1, Kam Commercial Services could not have been appointed because no such court broker was licenced by the Registrar of the High Court as evidenced by exh. D1. Five, the warrant of sale (exh. P3) does not reveal the name of the Magistrate who signed it. On the other hand, by DW2's own evidence she made an application for execution before the District Court at Temeke and had execution form filled and upon payment of the requisite fees she was advised to go to

Mbagala Primary Court. The second Defendant is on record telling the Court that she was advised by a Magistrate whose name was not disclosed to wait for a call to receive her entitlement from the decree. DW2 told the court further that after some time she got a call from a Magistrate whose name was again not disclosed who gave her Tshs. 16,417,722/= cash in the office and that the amount was lawfully due to her composed of principal sum and interest.

In my judgment, it will be clear from the foregoing that the evidence proving that the 1<sup>st</sup> Defendant dealt with the execution of the decree in the manner contended by the Plaintiff is but too weak to support her case. I would for that reason endorse the submissions by the learned State Attorney that the Plaintiff has failed to discharge her burden of proof required of her that the 1<sup>st</sup> Defendant made any wrongful or fraudulent order resulting into ejection of the Plaintiff from her house in execution of a decree in case No. 112 of 2005. Simply stated, the evidence led by the Plaintiff is too insufficient to discharge a burden of proof on the tort of misfeasance in public office. It may be instructive at this stage to reiterate the principle which I have had an opportunity to apply in previous cases regarding the plaintiff's burden of proof. The principle is to be found from the works of **Sarkar's Law of Evidence, 18<sup>th</sup> edition, M.C. Sarkar, S.C. Sarkar and P. C. Sarkar**, published by Lexis Nexis expounding useful commentaries derived from numerous courts' decisions in India interpreting section 104 of the Indian Evidence Act which is *impari materia* with our section 113 of the Evidence Act, Cap 6 [R.E. 2002] applied in **Kibaigwa Agriculture and Marketing Co-operative Society Ltd v. Stanbic Bank Tanzania Limited**, Civil case No. 211 OF 2011, **Atashasta Nditiye and others V Lingo Milele Haule & 3 others**, Land Case No. 63 of 2010, and **Zaidi Baraka v. Ngoro R Bole**, Land Case No. 70 of 2012 (all unreported). The principle stresses that the Plaintiff's discharge of his burden of proof is not

dependent on the weakness(if any) of the defence case. The Plaintiff must first discharge his burden of proof before calling upon the defendant to prove his case. The Plaintiff has not surmounted that hurdle.

Indeed as rightly submitted by Ms. Proscovia learned Advocate for the 2<sup>nd</sup> Defendant the Plaintiff's evidence alleging fraudulent acts falls short of the standard required in similar cases where a crime is imputed on the authority of **Hidaya Ilanga v . Manyama Manyoka** and **Omari Yusufu v. Rahma Ahmed Addulkadr** (supra). In consequence, there being no proof of existence of misfeasance in public office, I hesitate to answer the first issue in the affirmative as urged by the Plaintiff. That issue is answered against the Plaintiff. Next I turn my attention to the second issue which calls for a determination whether the Plaintiff has any cause of action against the 2<sup>nd</sup> Defendant.

Admittedly, the second issue was framed premised on an affirmative answer to issue No. 1 above. The learned State Attorney has invited the court to answer the issue in the affirmative because it is the 2<sup>nd</sup> Defendant who applied for execution before the District Court and eventually got payment of Tshs. 16,417,722/= from the sale of the Plaintiff's house through forged documents (exh. P2, P3 and P4). Whilst admitting that the Plaintiff did not adduce sufficient evidence to link the 2<sup>nd</sup> Defendant with forgery of execution documents, the learned State Attorney submitted that the fact that the 2<sup>nd</sup> Defendant admits to have benefited from the sale proceeds of the Plaintiff's house through an unlicensed Court Broker which resulted into eviction of the Plaintiff from her house, the 2<sup>nd</sup> Defendant must be held liable to the Plaintiff.

The learned Advocate for the 2<sup>nd</sup> Defendant for her part submitted that the execution was properly done through the Primary Court free from any wrongful and/or fraudulent order but even it was so, the Plaintiff has failed to prove how the 2<sup>nd</sup> Defendant aided and abetted the 1<sup>st</sup> Defendant to make the impugned

order leading to eviction from her house. Addressing the Court on the issue, the Plaintiff argued that there was sufficient evidence that from exhibits P2 and P3 that the documents came into existence as a result of collusive acts of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and so the latter cannot escape liability. It was her further submission that:

*"...2<sup>nd</sup> Defendant procured the said wrongful act of the 1<sup>st</sup> Defendant. The 2<sup>nd</sup> Defendant knowingly and for own ends induced the 1<sup>st</sup> Defendants to commit an actionable wrong vis, misfeasance in Public Office by causing exh. 2 and 3 to come into existence..."*  
*[at Page 6 of the Plaintiff's written submissions].*

A discussion on the merits and demerits of this issue requires as of necessity an understanding of what constitutes a cause of action. Ms. Lupondo made reference to **John Mwombeki Byombalirwa Vs. Agency Maritime Internationale** [1983] TLR in which the Court of Appeal defined the expression cause of action to mean essentially the facts which it is necessary for the Plaintiff to prove before he can succeed in the suit. The Plaintiff's complaint against the 2<sup>nd</sup> Defendant in this suit is to be found in para 18 of the amended plaint reproduced earlier. According to the said paragraph, the Plaintiff's cause of action against the 2<sup>nd</sup> Defendant is constituted by aiding, encouraging or assisting the 1<sup>st</sup> Defendant to commit abuse of public office. That being the case, it appears to be logical that a successful claim against the 2<sup>nd</sup> Defendant is predicated upon the Plaintiff sustaining her claim against the 1<sup>st</sup> Defendant. The position is regrettably that the Court has already determined the first issue against the 1<sup>st</sup> Defendant. That means that the Plaintiff cannot maintain a cause of action for abetting where she has not established her case against the person alleged to have been assisted or encouraged to commit a public misfeasance. Put it differently, in the context of amended plaint, the Plaintiff's cause of action

against the 2<sup>nd</sup> Defendant cannot exist independent of the 1<sup>st</sup> Defendant and so her claim must fail. In the upshot, my inevitable answer to the 2<sup>nd</sup> issue will be that the Plaintiff has no cause of action against the 2<sup>nd</sup> Defendant and I so hold.

Having answered the first two issues against the Plaintiff, the third issue which is dedicated to damages must follow suit. This is so because as I said earlier, that issue was dependent on affirmative answer to the first two issues. After finding no liability against the Defendants, the question of damages does not arise and I accordingly hold that the Plaintiff has not suffered any damages as a result of any wrongful acts of the Defendants.

Finally, in the light of the foregoing, the Plaintiff's suit stands dismissed. Each party shall bear own costs. Order accordingly.



  
**L.J.S. MWANDAMBO**

**JUDGE**

**23/02/2018**