IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM
CIVIL APPEAL NO. 79 OF 2016

(Arising from the decision of the Resident Magistrate's Court of Morogoro in Civil Case No. ***32 of 2014)***

IDDI SALUM BABU .... APPELLANT

VERSUS

GRACE SILLO WAWA .... 1ST RESPONDENT

MIC TANZANIA LIMITED .... 2ND RESPONDENT

TIGO TANZANIA LIMITED .... 3RD RESPONDENT

JUDGMENT

Date of Last Order: 22/06/2018
Date of Judgment: 10/07/2018

BANZI, J.:

This appeal emanates from Civil Case No. 32 of 2014 instituted in the Resident Magistrate's Court of Morogoro whereby the appellant unsuccessful sued the respondents for an order for removal of TIGO tower and payment of Tshs. 10,000,000/= being special damages for injury caused.

The trial proceeded in the absence of the 1st respondent and after receiving testimonies of the appellant and remained

respondents together with documentary evidence, the trial court dismissed the suit with costs. Aggrieved with that decision, the appellant through the service of CBS Law Chambers preferred this appeal. Their memorandum of appeal contained four (4) grounds as hereunder;

1. *That, the trial Magistrate erred in fact and in law when held that there was no cause of action between the plaintiff and the defendants while relying on the Novation Agreement which speaks loudly against the defendants.*
2. *That, the trial Magistrate erred in law when failed to observe that the defendants were in occupation of the premises complained of to-date, and committed nuisance even if ownership of the premises might have changed (although it is not).*
3. *That, the trial Magistrate erred in fact and in law when failed to distinguish Kihonda and Lukobe areas in Morogoro Municipality, ending up making a decision that no cause of action existed between the plaintiff and the defendant while it was not correct.*
4. *That, the trial Magistrate erred in law when overlooked the fact that the court proceeded ex-parte against the first defendant as she neither filed a defence nor appeared in court despite the substituted service issued against her.*

At the hearing of the appeal, the appellant was represented by Mr. Jackson Liwewa the learned advocate while the second and third respondents (herein referred as respondents) were represented by Mr. Gerald Riwa, the learned advocate. The first respondent never appeared despite the substituted summons through Mwananchi newspaper dated 25th October, 2017 as a result the appeal against her was proceeded ex-parte under Order XXXIX Rule 17(2) of the Civil Procedure Code [Cap.33 R.E. 2002] (the Code).

Arguing in support of the first ground, Mr. Liwewa began his submission by referring the case of **Mukesh Gaurishanker Josh v Gintex Supplies and others**, Civil Case No. 102 of 1997 where it was held that; a true position of law in determining on the existence or otherwise of a cause of action we should not look at anything else except the plaint and its annexures and nothing else. Basing on that position he further submitted that, going through the appellant's plaint it was obvious that he was affected by the tower and generator installed by the respondents.

He further argued that, the installed generator caused noises which interfered with the use and enjoyment of the appellant's land, and according to him, that in itself amount to cause of action. To support his argument, he invited the court to refer the decision of **Domin P.K.G. Mshana v Almasi Chande and Another**, Civil Case No. 68 of 1994 (unreported) which interpreted the cause of action as a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant and it must include

some act done by the defendant. In that regard he argued that, it was wrong for trial Magistrate to rely on Novation Agreement in ruling out that there was no cause of action.

Turning to the second ground he submitted that, for nuisance to be proved, there are three elements; one that the plaintiff owns the land or has a right to possess; two that, the defendant acted in a way that interferes with the plaintiff enjoyment and use of his property and three that, the defendant interference was substantial. He added that, in the instant case the plaintiff's house at Kihonda was four steps away from the installed generator which caused noise and pollution and hence interfered with the use and enjoyment of his land. He concluded that, it is immaterial whether the ownership changed hands, the fact that the generator was installed there and the respondents were occupant of the premises is relevant fact according to section 8 of the Evidence Act.

Submitting in support of ground number three Mr. Liwewa stated that, the appellant's house located at Lukobe which is a street within Kihonda area. Therefore, it was wrong for trial Magistrate to mix between Kihonda na Lukobe as the area subject matter of the dispute.

Finally, he submitted that, the trial Magistrate overlooked the issue of non-appearance of the 1st respondent. He argued that, it was enough for trial Magistrate to enter a decision against the 1st respondent the moment she failed to enter appearance as it signified

to have agreed with the claim. Therefore, he prayed that all grounds of appeal be upheld.

In response, Mr. Riwa submitted that, all grounds raised in the memorandum of appeal lack merits. Responding to the first ground, he argued that, the trial Magistrate was right to decide basing on the existence of Novation Agreement. He contended that, the said agreement (exhibit D1) was between Stella S. Mbwambo, HTT Infraco Ltd and MIC Tanzania Ltd on GM site MOR517 – Lukobe signed by both parties on 24th September, 2012. He added that, at the time the appellant filed the suit on 18th August, 2014 the telecommunication tower in question had already sold to the company called HTT Infraco Ltd. He urged the court to refer into paragraphs A and B of second part of exhibit D1.

Mr. Riwa further submitted that, it is shown in the record that the respondents followed the required procedures before installing the said tower including obtaining certificate on environmental impact assessment. More so, paragraph 1 at page 3 of exhibit D1 released the duties and liabilities from the respondents and transferred the same to HTT Infraco Ltd. He further added that, HTT was a necessary party and their absence could have made impracticable the execution of the 1st relief. He referred the case of **Surakant D. Ramji v Savings and Finance Ltd and Another** [2002] TLR 121 to support his argument.

It was the submission of Mr. Riwa that, the appellant failed to bring substantive proof that the disputed plot belongs to the 1st

respondent and the said telecommunication tower on the disputed plot belongs to respondents.

In respect of the 2nd ground, Mr. Riwa submitted that, the appellant did not submit any proof to substantiate his claim. The respondents had never received any demand note in respect of the alleged nuisance prior to 2012 and likewise, thereafter when HTT Infraco Ltd took over the tower they had never received the demand note in respect the claimed nuisance. He further argued that, there was no conclusive evidence brought in court to prove the appellant's house was seven steps away from the said tower. He contended that, the appellant did not bring the doctor to testify neither he brought any document from hospital to prove the alleged suffering from the installed generator. He added that, if there was nuisance which actually was not proved, the liability is on HTT Infraco Ltd as per exhibit D1.

In respect of the 3rd ground Mr. Riwa argued that, all parties knew the exact location of the disputed area which is Lukobe and it had never been an issue in the trial court.

He finally submitted that, exhibit D1 released the respondents from any liability arising from the said tower. If the appellant was entitled to anything he ought to have sued the right parties who are Stella S. Mbwambo as the owner of the land and HTT Infraco Ltd as the owner of the tower installed in the said land. In that regard he prayed for dismissal of this appeal with costs.

In rejoinder, Mr. Liwewa submitted that though there was change of ownership of the said tower as shown under exhibit D1, the respondents are still the beneficiaries of the tower which transmits the signals to their subscribers. That in itself was enough to establish cause of action against the respondents arising from nuisance generated by the tower. In response to the lack of proof on ownership of the plot in question he added that, no proof was required because it was not disputed by the 1st respondent. More so, the evidence of PW1, PW2 and PW3 proved the claims against the respondents in respect of nuisance out of noise from the generator in the installed tower. Hence he prayed for appeal be allowed with costs.

Having digested the submissions of both counsels, the petition of appeal and evidence on record, it is clear that, the contentious issue is whether the appellant had cause of action against the respondents. The answer to this issue will determine all grounds of appeal.

Before determining whether the appellant had cause of action against the respondents it is necessary to look on what amounts the cause of action. In the case of **John M. Byombalirwa v Agency Maritime Internationale (Tanzania) Ltd** [1983] TLR 1 the Court of Appeal at page 4 stated that;

> *"the expression "cause of action" is not defined under the Code, but it may be taken to mean essentially facts which it is necessary for the plaintiff to prove before he can succeed in the suit".*

It can also be defined as a bundle of facts which gives the plaintiff right to relief against the defendant[1]. It must also include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue[2]. The defunct Court of Appeal for East Africa ruled that in order to determine whether a plaint discloses a cause of action one has to look on the plaint together with its attachment forming part of it on assumption that any express or implied allegations of facts in it are true[3].

From these definitions it can be noted that, determination of cause of action depends on; one, the facts including the defendant's act pleaded in the plaint together with its attachment; and two, those facts must give the plaintiff right to relief against the defendant.

In the present case, though it was not pleaded on the plaint but looking at attachments forming part of the plaint, it can be noted that the appellant might have cause of action out of nuisance from noise pollution generated from installed communication tower. But having cause of action is one thing, against which party is another thing.

The contention of the respondents was that, the appellant had no cause of action against them, in other words he sued the wrong parties. I inclined to agree with both the learned trial Magistrate and

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[1] Takwani, C.K. (2016) Civil Procedure with Limitation Act, 1963 Seventh Edition, Eastern Book Company Lucknow, page 231

[2] See the High Court Ruling (Hon. Kalegeya J as he then was) in Civil Case No. 68 of 1994 **Domin P.K.G. Mshana v Almasi Chande and Attorney General** (unreported)

[3] See the case of **Jeraj Shariff & Sons v Chotai Fancy Stores** [1960] EA at page 375

the learned advocate for the respondents that, the appellant had no cause of action against the respondents.

Starting with the first respondent, the appellant sued Grace Sillo Wawa who is alleged to be the owner of the plot where the tower in question was installed. On the other hand, the respondents produced evidence showing that the owner of the said plot is Stella S. Mbwambo. It is apparent that, the said Grace Sillo Wawa is not the owner of the said plot. No wonder she is nowhere to be found despite several efforts of tracing her including substituted summons published in the newspaper. Had it being an existing person and owner of the plot in question, she could have been easily found following the efforts made by the trial court as well as this court.

In respect of the remained respondents, it is on record that, prior to 2012 the telecommunication tower in question was owned by MIC Tanzania Ltd (the 2nd respondent). However as appeared on exhibit D1, HTT Infraco Ltd are the owner of the said tower since 2012. The agreement under exhibit D1 transferred all rights, obligations and liabilities in respect of the said tower from the respondents to HTT Infraco Ltd. For the reasons therefore, if the appellant had a cause of action it ought to be against Stella S. Mbwambo and HTT Infraco Ltd and not against the present respondents.

However, without prejudice to the foregoing, it is the position of the law that not every nuisance is actionable. In the case of **Sadhu**

Construction Company Limited v Peter E.M. Shayo [1984] TLR 127 the Court of Appeal stated that;

> *"a nuisance to be actionable must be such as to be a real interference with the comfort or convenience of living according to the standard of the average man;* ***discomforts caused are not actionable if they fail to qualify as intolerable or unacceptable; the discomforts must cause suffering to the party complaining****".* (emphasis supplied)

In the present case, the appellant testified that, the noise from generator caused disturbance to him and his family causing lack of sleep. He couldn't do his work properly because of the disturbance. However, the nuisance claimed by the appellant falls under noise pollution which is governed by the Environmental Management Act, No. 20 of 2004. Under this law emission of noise are regarded as noise pollution if they exceed the minimum standards set by the National Environmental Standards Committee established under the Act. But no such evidence was adduced to establish whether the alleged noise exceeded the minimum standard in order prove that the discomfort caused was intolerable and unacceptable. It is my considered view that, the appellant was supposed to submit his complaint to the National Environment Management Council (NEMC) which through its Environmental Standards Committee it could have been discovered whether or not the said noise from the generator exceeded minimum standard amounting to noise pollution.

Regard, the relief claimed of Tshs. 10,000,000/= as special damage, firstly the appellant failed to plead in his plaint. In addition, taking his evidence as a whole, there is no proof to substantiate the said amount as claimed. It was held in the case of **Masolele General Agencies v African Inland Church Tanzania** [1994] TLR 192 that;

> *"Once a claim for a specific item is made, that claim must be strictly proved, else there would be no difference between a specific claim and a general one".*

For the foregoing reasons, it is apparent that the appellant failed to prove existence of cause of action against the respondents. Had it been established cause of action against the respondents, yet still the appellant failed to prove that the purported nuisance was actionable according to the law.

In the upshot, I find this appeal without merit and it is hereby dismissed in its entirety. Each party to bear its own costs.

Order accordingly.

Dated at Dar es Salaam this 10th day of July, 2018

I.K. BANZI
JUDGE
10/07/2018

Delivered this 10th day of July, 2018 in the absence of the appellant and 1st respondent and in the presence of Mr. Gerald Riwa, the learned advocate for the 2nd and 3rd respondents.

I.K. BANZI
JUDGE
10/07/2018

Right of appeal explained.

I.K. BANZI
JUDGE
10/07/2018