IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL APPEAL NO. 83 OF 2017

BROWN NYIREMBE .....APPELLANT

VERSUS

CARIACUS MMANDA .....RESPONDENT

25/4/2018 & 17/7/2018

JUDGMENT

I.P.KITUSI,J.

The appellant Brown Nyirembe lost in a suit for nuisance which he had instituted against the respondent Conviacus Mmanda at Ilala District Court at Samora in Dar es Salaam.

It was alleged that the appellant lives in his house at Kweupe area within Ilala Kota street in Ilala District and the defendant, a businessman was running a Guest House in the same neighbourhood.

What triggered of the case was an allegation by the appellant that the respondent had allowed dirty water to flow from his said Guest House to the appellant's residential house threatening his heath and that of the family members.

The appellant pleaded that efforts to require the respondent stop the nuisance failed even after he did so through leaders of the

Local Government responsible for the area. The appellant prayed for an order of payment of Shs 50 million as damages as well as an order of injunction restraining the respondent from causing further nuisance. The respondent maintained that he was no longer the owner of the building operating as a Guest House as he had allegedly sold it off to one Cliff Pantaleo. The appellant, unrepresented, led evidence of two witnesses to prove his case, himself testifying as Pw1.

Pw1 stated that in 2011 when the defendant was constructing the house in question near his residential house he drained dirty water containing faeces and allowed it to flow through his house. Pw1 reported the matter to the street leaders who authorised him to take legal action against the respondent after he defaulted to appear before him for amicable settlement.

Pw1 approached the Legal and Human Rights Centre a Legal Aid Centre, who wrote the respondent a demand letter for ShS 50 million and requiring him to stop the dirty water from flowing through his house. Pw1 tendered four photographs (collectively Exhibit P1) to demonstrate a pictorial account of what had taken place.

Pw1 was subjected to a very long cross – examination by Mr Mmanda, learned advocate who represented the defendant in the course of which he stated that during the alleged flow of the dirty water through his house he was not living there but it affected members of his family who were occupying the house. He could not recall the exact dates when the defendant allegedly caused the nuisance

but said it happened during the year 2011 when he was constructing a Guest House. Further Pw1 emphatically stated that the defendant is the owner of the Guest House known as Manyosa from which the dirty water used to flow in the course of construction.

On whether Pw1 had proof of the injury to his family and whether he could justify the claim for payment of Shs 50 Million, Pw1 stated that members of his family kept complaining of ill health and he would now and then travel from Arusha to Dar es Salaam to take them for medical care which was being paid for. He said he had no medical records because it never occurred to him that the matter would be litigated in court.

One Said Walala (Pw2) testified in support of the fact that Pw1 reported the nuisance to him being the Chairman of the street where his house is situated. Pw2 stated that he and the Ten Cell Leader of the area visited the place but only saw a trail of wet soil from the respondent's house running along the wall of the house of Pw1. They did not see any dirty water on that date.

Pw2 supported Pw1's version as regards the respondent being the owner of the Guest House.

In defence the respondent denied being the owner of the premises the subject of Pw1's complaint as he allegedly sold it off to his son in 2008, although he later came to learn that it was one Tarsiana Eligi Shirima who was running the Guest House.

During cross – examinations by the appellant and the re-examinations that followed it was very unmistakable that the parties do not see eye to eye. The appellant put to the respondent the question why his employment with Tanzania Revenue Authority had been terminated, to which the respondent replied it was a result of the appellant's instigation. Despite those sentimental and rather out of place digressions the issues at the trial were;

1. Whether the defendant owns (sic) house at Kweupe Ilala Quarter.
2. Whether the defendant (sic) he has Guest House business at that area.
3. Whether there was nuisance and threat of life to the plaintiff by the defendant.
4. If issue No. 3 is answered in the affirmative whether plaintiff suffered any damage.
5. To what reliefs the parties are entitled.

These issues were framed by the court in the presence of the parties on 14 September 2016. However in its judgment the trial court raised and considered a completely different set of issues which are;

1. Whether the defendant is a necessary or proper party to the suit.
2. Whether the defendant caused nuisance and threat to the plaintiff's life.
3. Whether the plaintiff suffered any damages.
4. What reliefs the parties are entitled to.

The trial court considered these issues and dismissed the suit on two grounds; first that the plaintiff did not join the person who was in actual occupation of the premises from which the dirty water allegedly flowed, and secondly that there was no proof that the nuisance was continuous.

Before I proceed to determine the merits of the appeal I have considered it necessary to address the procedural issue regarding the change of issues suo motu by the learned trial magistrate. The law as to issues does not bind a Magistrate to those framed at the beginning of the trial if some more issues arise from the pleadings and where evidence is led to address them. This position was taken by the court of Appeal in **Stella Temu V. Tanzania Revenue Authority** [2005] TLR 178.

The main consideration in my view is whether or not parties have been heard before the court decides any fact one way or the other. The decision of the court of Appeal in **VIP Engineering and Marketing Limited and others V. City Bank Tanzania Limited** CAT, Consolidated Civil References No 6,7 and 8 of 2006 (unreported) is very instructive on the subject;

> *" The right of a party to be heard before adverse action or decision is taken against such a party has been stated and emphasized by the courts on numerous decisions. The right is so basic that s*

decision which is arrived at in violation of it would be nullified ....."

This case was cited with approval in **Samson Ng'walida V. The Commissioner General Tanzania Revenue Authority**, Civil Appeal No. 86 of 2008, CAT (unreported).

The appellant was aggrieved by the decision of the trial court and expressed it in five grounds namely;

1. That the trial Court erred in proceeding with the matter that was res judicata.
2. That the trial court erred in deciding the case based on insufficient or missing evidence .
3. That the trial court failed to properly evaluate the evidence.
4. That the trial court erred in relying on the respondent's uncorroborated evidence.
5. That the trial court's conduct of the case occasioned injustice.

The parties appeared in person at the hearing of the appeal and had nothing to submit in support of their respective positions. I think the only issue that falls for consideration is whether the learned trial magistrate arrived at a correct decision in view of the evidence before her.

I have already stated the two points that formed the trial court's basis for its decision. The first point is that the suit was preferred without joining the necessary party. This issue was raised by the court suo motu and it is clear from the proceedings and pleadings that the issue was raised in the written statement of defence and testified on. In the case of **Stella Temu** (supra) the court of Appeal held that it is proper for the court to determine such an issue if it is pleaded and testified on.

However the trial court did not accept the respondent's evidence that he had sold the house to his son, therefore the question that sticks out for determination is whether now the respondent could be absolved from duty not to interfere with the appellant's right over his house. I think he could not. The burden was on the respondent to prove that he was not the actual occupier of the premises at the time of the alleged nuisance, and in my re- evaluation of the evidence, he did not discharge that burden.

Therefore my finding will be that the appellant had sued the necessary party for the determination of the suit.

The second point is on the merits of the alleged nuisance and whether the same was proved. The trial court's finding was that there was no proof of dirty water flowing into the appellant premises and that it was continuous. The learned trial magistrate considered the evidence of Pw2 as establishing that there was no proof of dirty water flowing.

With respect I agree with the learned trial magistrate's evaluation of the evidence. The appellant's own witness(Pw2) disproved the claim that dirty water containing faeces was flowing from the respondents premises. The appellant's complaint that the trial court failed to properly evaluate the evidence does not hold in view of Pw2's clear statement that supported the defence case.

It is always the duty of the one who alleges a fact, to prove it. [See **Peter Joseph Mushi. V. Lyolo & Co Limited,** Civil Appeal No. 21 of 2014, High Court Dar es Salaam Registry (unreported).

In the circumstances I find this appeal to be lacking in merits and I dismiss it with costs.

I.P.KITUSI

JUDGE

16/7/2018