

**IN THE HIGH COURT OF THE UNITED REPUBLIC TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CIVIL APPEAL NO. 169 OF 2017

*(From the Ruling and Drawn Order of Kisutu Resident Magistrate
Court in RM'S Civil Case No. 262 of 2016 delivered by Victori
Nongwa SRM on 12th July, 2017)*

WILSON RENALD.....APPELLANT

VERSUS

SALUM HAMIS NASSORO.....RESPONDENT

JUDGMENT

Date of last order 15/10/2019

Date of Judgment 28/10/2019

NGWALA, J.

The Appellant is challenging the decision of the Resident Magistrate Court of Dar es salaam at Kisutu. His appeal is against the Ruling and Drawn Order on the ground that, the trial Magistrate grossly erred and misdirected on holding that, the suit was time barred.

In the original suit against the respondent, the appellant claimed a total sum of Tshs. 10,000,000/= as compensation and punitive

damages for malicious prosecution. Before hearing the main suit, a preliminary objection on point of law was raised by the respondent, which is the basis of this Appeal that, the suit was time barred. The trial Court sustained the preliminary objection, hence this Appeal.

At the hearing of this Appeal, the Appellant was represented by Mr. Lugaziya learned Advocate, while the respondent was represented by Mr. Abraham Hamza Senguji learned Advocate.

Mr. Lugaziya submitted that, the time limit for one to institute a malicious prosecution suit is three (3) years and not one year. To him, it was wrong for the trial court to hold that, the Law of Limitation Act (Cap. 89 R: E 2002) was applicable in the circumstances of this case. He therefore, prayed this court to quash and set aside the Ruling and Drawn Order of the trial court.

In reply, Mr. Senguji strongly resisted the contention by the Appellant. He supported the decision by the trial court that, the suit was time barred as it is in accordance with the law. He stated the evidence on record show the appellant was demanding compensation for malicious prosecution and not damages for tortious claims. The appellant was not required to quantify

damages because they are within the domain of the court. He insisted the 1st schedule of the Law of Limitation Act is applicable and the time limit for claims of compensation is one year.

In rejoinder, Mr. Lugaziya, argued that malicious prosecution is a common law intentional tort. It is item 6 which is proper in the Law of Limitation Act, that provides a limitation of three years. As the plaintiff now the appellant asking compensation for damages, for being maliciously put behind bars, that compensation was for his personality. The 1st schedule cited by the counsel for the respondent has no bearing to the facts of the present case. The appellant was not prevented from doing anything. The interpretation was wrong. He reiterated the prayers in the memorandum of Appeal.

In view of the submission by both the counsels for the parties, I find that the crux of the matter is whether the claim by the Appellant is a tortious or a normal civil suit.

It is not disputable that, malicious prosecution is a common law tortious claim, not a legislated law, which endeavours to prevent abuse of legal system. Therefore this matter is not a normal civil claim.

Therefore, the trial magistrate was only required to test whether the claims fell under tortious act or civil suit. The elements for malicious prosecution in a suit, have to be established on the face of record only at that particular stage, as held by the Court of Appeal of Tanzania in the case of **PAUL VALENTINE MTUI & ANOTHER v. BONITE BOTTLERS LIMITED CIVIL APPEAL NO.109/2014** (Unreported) that quoted the case of **YONA NGASA v. MAKOYE NGASA [2006] TRL 213** which provided that, a party suing for malicious prosecution must prove the following ingredients;

- 1. That the proceedings were instituted or continued by the defendant;*
- 2. That the defendant acted without reasonable and probable cause;*
- 3. That the defendant acted maliciously;*
- 4. That the proceedings terminated in the plaintiff's favour.*

In order to determine those elements as enunciated in the cited case of **YONA NGASA** (supra), it is my observation that, all of the ingredients or elements of malicious prosecution requires evidence to prove their existence or otherwise. The counsel for the Appellant argued it is a tort of malicious prosecution while the

respondent stated it is a normal civil suit. A test was required to prove either of the two. Employing the test invites evidence. It is settled law that, a preliminary objection should be on pure point of law capable of disposing a suit and should not require proof thereof. So long as there are two scenarios on the matter, it cannot be taken that the issue falls squarely under the ambit of a preliminary point of objection. A preliminary objection on Point of law must consist only a pure point of law. It should not be raised where the point of law is uncertain. The case of **Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors** (1969) E A 696 elucidates this point.

Much as it is not disputed that the question of limitation of time is a point of law, but in the circumstances of this case, it requires evidence to prove that fact as the alleged limitation period of one (1) year on the 1st Schedule of the Law of Limitation Act, that provides for compensation for doing or for omitting to do an act alleged to be in fact in pursuance of any written law; cannot be clearly stated with certainty where the record of the trial court does not show the genesis of the reporting to the police, as provided under section 7 of the Criminal Procedure Act, [Cap. 20 R:E 2002]. More so, the counting of that period or date of accrual cannot be determined only from the date of reporting the matter

to the Police, before the matter had to be finally decided by the trial court.

As the claim was for malicious prosecution under which item 6 of the Law of Limitation Act [Cap. 89 R:E 2002] provides for the period of three (3) years, it is my finding that, this case falls under malicious prosecution as shown in the contents of the plaint on the reliefs sought that 'the claim is for compensatory and punitive damages for malicious prosecution'.

For that reason, the trial Court ought to have overruled that preliminary objection and proceed to determine the main suit, on merit. In sum, this Appeal has merit. The Ruling and Drawn Order of the trial Court is therefore quashed. Accordingly, trial *de novo* is ordered before another magistrate.

Appeal allowed with costs.



A. F. Ngwala

JUDGE

28/10/2019

28/10/2019

Coram: A. F. Ngwala, J.

Appellant - Present

For Appellant - Dr. Lugaziya (Advocate)

For the Respondent - Mrs. Thea Francis (Advocate)

B/C - Miss Lulu Masasi

Court: Judgment delivered in open court in the presence of the counsels for the parties.

Court: Right of Appeal to Court of Appeal of Tanzania explained.


A. F. Ngwala

JUDGE

28/10/2018