IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CIVIL APPEAL NO. 1 OF 2020

DONALD PATRICK .....APPELLANT

VERSUS

MTENDAJI WA KIJIJI – KIRIBA .....RESPONDENT

(Arising from DC Civil Case No 14/2019 of the District Court of Musoma at Musoma)

JUDGMENT

1st & 24th July, 2020

Kahyoza, J

Donald Patrick (Donald) sued **Mtendaji wa Kijiji – Kiriba** before the District Court of Musoma claiming for –

a) General damages to the tune of Tshs. 35,000,000/= due to loss of business and reputation.
b) Interest on the decretal sum at court rate from the date of initiation of the criminal case to the date of delivery of judgment to this case.
c) Interest on (a) and (b) at court rate from the date of delivery judgment to this case to the date of satisfaction of the decree.

The trial court heard the case ex-pate as the defendant did not appear to defend the claim. The plaintiff gave oral evidence.

instead of dismissing it or rejected the plaint. He added that the trial court should not have entertained the suit in the absence of the proper party. In support of his contention, he cited rule 11 of **Order VII** of the **Civil Procedure Act**, [Cap. 33 R. E. 2019] (the **CPC**), which provides that the plaint shall be rejected in the following cases, **one**, where it does not disclose a cause of action; **two**, where the relief claimed is undervalued and the plaintiff fails to correct it; **three**, where the suit appears from the statement in the plaint to be barred by any law. On the bases of the cited provision of the law, Mr. Makowe contended, that after the court found that **Donald** was bond to sue village officer in his personal capacity, it had duty to reject the plaint.

He concluded that by hearing the suit on merits, the trial court prejudiced Donald's case because it implied that Donald failed to prove his case merit.

Was it proper for trial court to determine the suit on merit?

I passionately considered the issue whether it was proper for trial court having found that Donald did not sue the proper party to determine the suit on merit. I have no hesitation to answer that question affirmatively. It is my firm opinion that the trial court committed no procedural error to determine the suit on merit on the following reasons; **One**, rule 11 of Order VII of the **CPC**, refers to rejection of a Plaint and not a suit. The plaint is can be rejected before it is registered or at any stage before the trial is concluded. The trial court in the case at hand observed that the plaintiff did not sued a

every suit deal with the matter in controversy so far as regards the right and interests of the parties actually before it."

I am of the considered opinion that non-joinder of a party, referred to appellant's advocate as the proper party, did not render the suit not triable on merit.

Three, **Donald** was at liberty to sue a person he thought he had a claim against him. The Court of appeal took a similar position in the case of **Farida Mbaraka and Farida Ahmed Mbaraka V. Domina Kazenki** Civil Appeal No. 136/2006(unreported) that "*the respondent would not be compelled to sue a party she did not wish to sue but still the determination of the suit would not be effective without the Tanzania Housing Agency being joined. Hence it diverted the High Court to proceed to join the necessary party.*"

In this case, Donald not only did he not sue a proper party but also, he sued a person who has no legal personality. Even if he won the suit it would have been difficult for him to execute a decree. All in all, that is the person he picked to sue.

Lastly, the trial court raised the question whether it was proper for the plaintiff to sue the defendant at the time it was composing its judgment. That issue was not one of the issues framed for determination at the commencement of the trial. Thus, the trial court's observation had no consequences on the determination of the suit. It was an *obiter dictum*.

6, it was held that the dismissal of criminal prosecution of absence of reasonable and probable cause. In respect of the fourth element, the plaintiff's evidence is silent on how the defendant instituted criminal case maliciously.

.....Therefore, as there is no cumulative proof of all ingredients for the claim of malicious prosecution to stand, with due respect, my finding is the plaintiff did not establish his claim."

It is an established principle that a plaintiff suing for malicious prosecution has to establish all its elements. The Court of Appeal and this Court have in cases without number elaborated the ingredients of the tort of malicious prosecution, some of such cases are **Hosia Lalata v Gilbson Mwasote** [1980] TLR 154, **Yonah Ngassa v. Makoye Ngassa** [2006] TLR 213, **Abdulkarim Haji v Taymond Nchimbi Alois & Another** [2006] TLR 419 and **Jeremiah Kamama v. Bugomola Mayandi** [1983] TLR 123, a few to mention. In **Yonah Ngassa v. Makoye Ngassa,** the Court of Appeal decided that –

"....for the claim of damages arising from malicious prosecution to stand, there must exist cumulatively five elements namely, ***one****, that the plaintiff must have been prosecuted;* ***two****, the prosecution must have ended in the favour of the plaintiff;* ***three****, the defendant must have instituted the proceedings against the plaintiff without reasonable and probable cause;* ***four****, the defendant must have instituted the proceedings*

Court: Judgment delivered in the absence of the appellant and his advocate and in the presence of Mr. Anthony Sasi, the Kiriba Village Executive Officer. B/C Mr. Charles present.

J. R. Kahyoza

JUDGE

24/7/2019