

**THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF BUKOBA
AT BUKOBA**

CIVIL CASE APPEAL NO. 18 OF 2017

(Arising from the Ruling in Civil Case No. 7 of 2017 at the Resident Magistrate's Court of Bukoba at Bukoba)

BRAGTON JEREMIA ----- APPELLANT

Versus

SILAS KATABARWA ----- RESPONDENT

JUDGMENT

13.02.2020 & 24.02.2020

Mtulya, J.:

Bragton Jeremia (the Appellant) was aggrieved by the decision of the Resident Magistrates' Court of Bukoba at Bukoba (the court) in Civil Case No. 7 of 2017 (the case) hence preferred an appeal in this court. In his Petition of Appeal lodged on 15th of September 2017, the Appellant submitted the following two grounds, in brief viz:

- 1. That the court erred in law when terminated the preliminary objection basing in the Criminal Case No. 59 of 2017 decided by the Kassambya Primary Court was not instituted by defendant; and*
- 2. The court erred in law to hold that court irregularities cannot be cause of action against the defendant.*

In his prayers, the Appellant prayed before this court, apart from other reliefs, to quash decision of the Resident Magistrates' Court of Bukoba at Bukoba in Civil Case No. 7 of 2017. The appeal was protested by Silas Katarwa (the Respondent), who hired the legal services of learned counsel Ms. Aneth Lwiza to file a reply in this court on the 27th of August 2019. In her reply, Ms. Lwiza contended that the first ground has no merit and the second ground is misconceived. The filed reply of the petition shows in brief the following words:

- 1. That the decision of the court in dismissing Civil Case No. 7 of 2017 was proper after it had come to the conclusion that the Appellant had no cause of action against the Defendant; and*
- 2. That the judgment of Kassambya Primary Court in Criminal Case No. 59 of 2017 that was the basis for the claims of the Appellant in Civil Case No. 7 of 2017 was nullified by the District Court.*

When this appeal was scheduled for hearing on 18th day of November 2019, the Appellant prayed before this court to argue his

appeal by way of written submission. The prayer was not protested by learned counsel Ms. Lwiza hence scheduling order was drafted and submissions were complete on the 2nd day of December 2019.

The Appellant in his written submission in support of the grounds of appeal decided to abandon ground number one (1) of appeal and preferred to argued ground number two (2) only. In arguing the second ground of appeal, the Appellant submitted that his case was dismissed on a preliminary objection that he had no cause of action against the Respondent. To the Appellant it is a settled law that to determine cause of action, the court should look at the plaint and its attached exhibits as it was decided in **John M. Byombalirwa v. Agency Maritime Internationale (Tanzania) Ltd (1983) TLR 1** and **National Oil (Tanzania) Ltd & Another v. Standard Chartered Bank (T) Ltd Commercial Case No. 97/2005 (HC - Dar Es Salaam** (unreported).

On the above cited precedents, the Appellant argued that to determine whether one has a cause of action against another it is necessary to peruse plaint and its attached exhibits and that the

preliminary objection is a purely a point of law that does not need scrutiny of documents or exhibits attached in the plaint.

The Appellant stated that the plaint and attachments show that he was convicted and sentenced from the complaints made by the Respondent thus the facts that the Respondent misrepresented the facts is not a defence that vitiates the claims or defeats the case instituted by the Appellant against the Respondent which could have made the case suffer a dismissal.

Finally, the Appellant complained on the right to be heard contending that he was denied an opportunity to be heard which resulted into failure of his evidence being tendered and evaluated to see whether the Appellant had a cause of action against the Respondent and not a mere imagination of what transpired at the Kassambya Primary Court in Criminal Case No. 59 of 2015.

In her written submission to reply the Appellant's submission, Ms. Lwiza stated that the court correctly dismissed the claims of the Appellant after it had come to the conclusion that the Appellant had no cause of action against the Respondent. Ms. Lwiza conceded that in

order to determine a cause of action in a suit the court should look at the plaint and its attachments. With the cited precedents in **John M. Byombalirwa** (supra) and **National Oil (Tanzania) Ltd & Another** (supra), Ms. Lwiza accepted their positions as rightful precedents and that the court rightly applied their principle to decide that the Appellant had no cause of action against the Respondent.

Ms. Lwiza submitted further that paragraph 4 of the Appellant's plaint filed at the court, the Appellant based his claim on malicious prosecution from Criminal Case No. 59 of 2016 of Kassambya Primary Court and cited paragraph 9 of the plaint regarding Criminal Appeal No. 70 of 2016 of the District Court of Bukoba which quashed the decision in Criminal Case No. 59 of 2016. However, the learned counsel cited paragraph 3 at page 5 of the decision of the court arguing that the court analyzed the arguments and decided in Respondent's favour.

With regard to the Appellant's complaint that the court is not supposed to peruse the plaint and annexures to determine the preliminary objection, Ms. Lwiza submitted that the principle of law in **John M. Byombalirwa** (supra) was abided. Finally, Ms. Lwiza

submitted that since the claims of the Appellant was based on the judgment of Kassambya Primary Court which was nullified by the District Court in Bukoba, on the bases defective charge sheet which was not a fault of the Respondent to amount to malicious prosecution.

According to Ms. Lwiza, the Respondent complaint in the Primary Court was unlawful damage and dismantle parts of water-well which are the property of Ngando Village worth Tanzanian Shillings 1,800,000/= and the Primary Court convicted the Appellant for the offence of stealing which had never been a complaint of the Respondent. To Ms. Lwiza, the nullification of the proceeding was proper, but the Appellant cannot claim right basing on a nullity proceedings.

I have gone through the record of this appeal and the submissions made by the parties. Record show that sometimes in October 2014, the Respondent initiated legal proceedings against the Appellant before Kassambya Primary Court in Criminal Case No. 59 of 2017 which ended in his favour. The Appellant was not satisfied by the decision and preferred Appeal No. 70 of 2016 before the District Court of Bukoba, which quashed both the proceedings and decision. It is

from this nullification of the Primary Court decision by the District Court which moved the Appellant to lodge Civil Case No. 7 of 2017 before the Resident Magistrates' Court of Bukoba at Bukoba claiming Tanzanian Shillings Fifty Million (50,000,000/=) for malicious prosecution initiated by the Respondent.

The civil suit was protested by way of a preliminary objection on point of law drafted in the following words:

Take notice that at the commencement of the hearing of this suit or any other date when the suit shall stand adjourned, the Defendant through his Advocate shall raise a preliminary objection on a point of law to the effect that:

- i. The verification clause is fatally defective for failure to disclose the source of information; and*
- ii. The plaintiff has no cause of action against the defendant.*

The protested verification clause is drafted by the Appellant in the following words:

I, BRAGTON JEREMIA, hereby verify that all that has been stated above in paragraph 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 are true to the best of my knowledge save for paragraph 11 which is based on information from my advocate I verily believe to be true.

The preliminary objection was argued by way of written submissions and after the completion of the submission, the Resident Magistrates' Court decided in favour of the Respondent. In upholding the preliminary objection, the Resident Magistrates' Court dealt with the second objection only which disposed the entire suit. The reasoning of the court is found at page 5 of the typed judgment that:

The Plaintiff argued that this was done maliciously by the defendant, but looking at his plaint on paragraph 4, the Plaintiff states that the complainant into that was filed before Kassambya Primary Court was that the Plaintiff did unlawfully damaged and dismantled parts of water well, the property of Ngando Village, instead of dealing with that complaint the trial court instituted the offence of stealing of which the appellate court nullified.

In other words, what the defendant complained is not what the court dealt with which cannot be shifted to be the complainant fault. Hence these claims which originates from the courts irregularity cannot be said to be a cause of action against the defendant ... the fate or rights of the parties with regard to what the defendant complained before Kassambya Primary Court has not yet been determined to date.

It is from this reasoning where the Appellant was not satisfied and complained before this court in the following words as they are depicted in his petition of appeal:

The Resident Magistrate erred in law and fact when came to the judgment that court irregularities cannot be cause of action against the defendant while the defendant never raised those termed irregularities since delivery of the judgment by the primary court.

In his written submission, the Appellant demonstrated his complaint in the following words:

My lord, looking on the plaint and the annexures, it is evident that the appellant was convicted and sentenced on the move or complaints made by the respondent thus the facts that the respondent misrepresented the facts is not the defence that vitiates the claims or defeats the case instituted by the appellant against the respondent.

Having gone through the second ground of appeal and complaint before this court, the only issue this court is invited to settle, in my opinion, is whether decision in Criminal Case No. 59 of 2016 of Kassambya Primary Court, which was nullified by the decision in Criminal Appeal No. 70 of 2016 of the District Court of Bukoba at Bukoba, can stand to justify a civil suit of malicious prosecution. It is the rule of law and practice of courts that once the proceedings and decision of lower court is nullified by superior court in judicial hierarchy, the nullified decision becomes non-existing. The nullified decision of Kassambya Primary Court in Criminal Case No.59 of 2016 nullified by the decision of District Court of Bukoba in Criminal Appeal No. 70 of 2016, does not exist and therefore cannot be relied to form cause of action in a civil suit of malicious prosecution. In any case, the

matter which was initiated by the Respondent in Kassambya Primary Court is not yet resolved to determine whether the Respondent initiated proceedings maliciously without reasonable and probable cause.

Assuming the second preliminary objection was determined differently, still the suit of the Appellant in the Resident Magistrates' Court would have remained with a fault in the verification clause. Upon perusal of the clause, it reveals confusion with regard to paragraph 11 of the plaint.

The confusion is in the wording of the verification clause which displayed: '*paragraph 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 are true to the best of my knowledge*' and '*save for paragraph 11 which is based on information from my advocate*'. The confusion here is reference of paragraph 11 in two levels. Firstly, the Appellant says the matters in paragraph 11 are true to the best of his knowledge and secondly, the Appellants says the information in paragraph 11 is to the best of information he received from his advocate.

The law regulating plaint is provided under Order VI of the Civil Procedure Code [Cap. 33 R.E 2002] (the Code). With regard to verification clause, Rule 15 (2) applies. This Rule states that:

*The person verifying **shall** specify, by reference to the numbered paragraphs of the pleading, what he verifies of his **own knowledge** and what he verified **upon information received and believed** to be true (emphasis added).*

This provision has already received interpretations from courts of law and now settled (see: **Aloys Lyenga v. Inspector General of Police and Another [1997] TLR 101** and **Godbelta Joel v. Geoffrey Pesha, Criminal Application No. 5 of 2017 (HC) Bukoba**). In **Aloys Lyenga** (supra), for instance, Msumi, J. (as he then was), at page 103 stated that:

...what the verifier was required to do was to itemise in the verification clause matter which were of his personal knowledge and those based on information or belief.

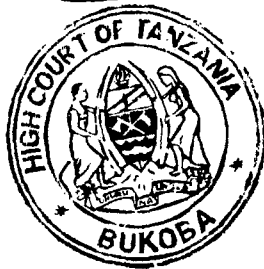
In the present appeal, the Appellant in his plaint at the Resident Magistrates' Court of Bukoba, cited paragraph 11 at two levels without itemizing matters he knows and those received and believed from his learned advocate. The distinction is important as the drafters of the Rules decided to use the word *shall* in the enactment of the Rule. This signifies the necessity of distinction of paragraphs from those the Appellant knows himself and those he received and believed from the other source (see: **Godbelta Joel** (supra)).

In the present case, the Appellant in his plaint filed at the Resident Magistrates' Court he stated that paragraph 11 includes matters he knows and those received and believed from his advocate. Plaint sets the court into motion. If the verification clause is fault the plaint itself becomes defective and court cannot not be said to have been properly moved, unless an amendment of the plaint is prayed and granted. Civil Case No. 7 of 2017 was not supposed to stand before the Resident Magistrate's Court of Bukoba at Bukoba for want of proper plaint.

For the foregoing reasons, this appeal must fail as it was filed without any merit whatsoever. It is accordingly dismissed with costs.

It is accordingly ordered.

Right of appeal explained.

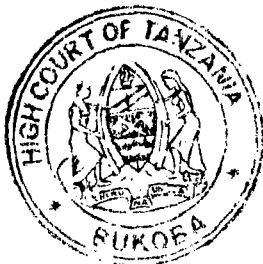



F.H. Mtulya

Judge

24/02/2020

This judgment was delivered under the seal of this court in the presence of the Appellant, Mr. Bragton Jeremia and in the presence of the Respondent Mr. Silas Katarwa and his learned counsel, Ms. Aneth Lwiza.




F.H. Mtulya

Judge

24/02/2020