IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY AT KIGOMA)

(APPELLATE JURISDICTION)

DC Civil Appeal No. 11 of 2020

(Original Civil Case No. 09/2019 of Kigoma District Court before Hon. K.V. Mwakitalu – (RM))

MUSSA S/O MUSTAFA.....APPELLANT

VERSUS

HALID S/O AHAMADI.....RESPONDENT

JUDGMENT

10th & 25th November, 2020

I.C. MUGETA,

The appellant who lost a case on a tort of malicious prosecution is represented by Masendeka Ndayanse, learned advocate while the respondent is represented by Sadiki Aliki, learned advocate. These counsel represented the appellant and the respondent at the trial court and at this court.

Mugeta

This appeal is founded on four grounds of appeal. I shall attend to them one after another. The first and second grounds shall be attended jointly as they are somewhat interrelated. For clarity and logical flow of arguments, I shall start with the second ground of appeal. It is a complaint that the trial court admitted the Written Statement of Defence in violation of Order VIII rule 1 (2) of the Civil Procedure Code [Cap 33 R.E. 2019]. The Order requires that a Written Statement of Defence be filed within twenty one days upon service of the plaint to the defendant. This ground of appeal reads as follows: -

> *'That the trial court erred in law in acting upon the written statement of defence by the respondent (then defendant) filed fraudulently and out of the prescribed time'.*

Here we have two allegations: Fraud and Written Statement of Defence being filed out of time. I shall deal with the issue of fraud first. This allegation was raised at the trial court too and it is maintained here on appeal for more or less similar reasons. At the trial court counsel for the appellant alleged that counsel for respondent colluded with the court clerk to have the Written Statement of Defence filed in court illegally. Hereunder, is what the learned advocate submitted before the trial magistrate: -

'Our second concern is whether the behavior of advocate' s to rob (sic) the court clerk to accept documents illegally and file them in the court file is proper'.

The learned counsel further submitted that since on 30/9/2019 the court ordered the defendant to file Written Statement of Defence on or by 15/10/2019, the Written Statement of Defence presented for filing on 15/10/2019 and court fees paid on 16/10/2019 was filed outside the prescribed time. The learned counsel was firm that as a matter of law, the filing date was 16/10/2019 because a document is deemed filed upon payment of the court fees.

Counsel for the respondent/defendant replied that the defendant was served with the plaint on 29/9/2020, therefore, when the Written Statement of Defence was filed on 16/10/2019 the 21 days within which to file it had not expired. On lobbying the court clerk to back date the Written Statement of Defence he submitted: -

this is not true and a blatant lie ... we filed our written statement of defence

Nyeta

on 15/10/2019 and we payed (sic) on the same date as shown on the bank paying slip'.

Upon hearing the parties on the objection that the written statement of defence was filed out of time, the trial court held: -

'I concur with the plaintiff counsel that the court clerk erred in receiving the defendant written statement of defence after this court had already ordered the hearing to proceed ex partes following the defendant none appearance on the date he was required to file a written statement of defence however I am positive that the court clerk error to receive the written statement of defence was due to the recklessness of the court clerk in court not observing the court order and it was ***not due to the inducement of the defendant***

counsel as there is no evidence to that effect'. *(Emphasis mine)*

I agree with the trial court that there is no evidence on record to prove fraud on part of the counsel for the respondent. In **Omar Yusuph v. Rahma Ahmad Abubakar** [1987] TLR 167 it was held: -

> *'When the question whether someone has committed a crime is raised in civil proceedings that allegation need to be established on a higher degree of probability than that which is required in ordinary civil cases'.*

In this case the only evidence of fraud relied upon by the counsel for the appellant is the difference between the date of presenting the Written Statement of Defence and the date of paying the court fees. Indeed, the written statement of defence shows that it was presented on 15/10/2019 and the ERV receipt for payment of court fees is dated 16/10/2019. Counsel for the respondent argued that they paid the fees on 15/10/2019 and if ERV is dated 16/10/2019 that is a fault on part of the court cashier.

Angeta

Indeed, the Written Statement of Defence and the ERV receipt show different dates. The responsible court officers were not asked to explain this. However, this might be due to the introduction of court fees payment through banks. One may pay in the bank and fail to present to the respective court evidence of payment on the same date. In such case the ERV issued upon presenting evidence of payment on the next date may reflect a date different to that on the bank pay in slip made the previous date. In such a situation doubts are cleared by presentation of the concerned bank pay in slip. This is, therefore, a matter of evidence. However, Mr. Sadiki Aliki did not present to the court evidence of paying into the bank on 15/10/2019. Therefore, the date which the written statement of defence was filed is the court fees payment date reflected on the ERV, namely, 16/10/2019 despite the endorsement that it was presented for filing on 15/10/2019. I agree with counsel for the appellant that the filing date is not the document presentation date but the date on which court fees were paid. Under the circumstances of this case, it is my view that the dating of the Written Statement of Defence with a different date might be a mere administrative error. I have reached this conclusion upon a thorough perusal of the trial court record which reflects a more or less similar problem with the plaint.

According to the plaint it was presented for filing on 20/9/2019. Court fee was paid on the same date vide ERV No. 23744246. However, initial orders for issuance of summons to file Written Statement of Defence and fixing the case for mention on 30/09/2019, were made on 19/09/2019. By this date the case had not been filed. Consequently, while it is of utmost importance that court officials work diligent and correctly to ensure court records are solemn, succinct and sacrosanct some administrative errors as in this case should never warrant allegation of fraud except where there is proof to that effect.

I made it clear from the outset that the second complaint has two parts. One part is about fraud which I have just disposed of. I move to the other part which is whether the written statement of defence filed on 16/10/2019, was filed out of time.

The counsel for the appellant answers the issue in the negative. On record there is no evidence from the plaintiff as to when the plaint was served to the defendant. However, there is undisputed submissions by counsel for the respondent that it was served on 29/09/2019. Therefore, by 16/10/2019 when it was filed, the 21 days within which to file it had not expired. They would have expired on 19/10/2019. Then what is the problem which caused

Mugeta

the bitter allegation that it was filed out of time? The answer is in the trial court's record.

In his ruling on the propriety of the filing of Written Statement of Defence, quoted herein above at page 3, the learned trial magistrate dubbed the court clerk as reckless for accepting the written statement of defence in violation of court orders. With respect this allegation was made against the court clerk unjustifiably. As I have demonstrated above the Written Statement of Defence was filed in time. Having examined the trial court record, it is my view that the trial magistrate reached his conclusion either without examining the record or by being driven by the unfounded allegation by counsel for the appellant/plaintiff that the court had ordered the Written Statement of Defence to be filed on or by 15/10/2019 which allegation he made before the magistrate on 15/10/2019. Despite its falsehood, the learned trial magistrate fell for it hook, liner and sinker.

The record shows initial orders were made on 19/9/2019. The case was fixed for mention on 30/09/2019. On 30/09/2019 parties appeared. The defendant who was unrepresented admitted to have been served with the plaint adding that he was yet to file Written Statement of Defence. Most likely, because the 21 days had not expired. Then the court made the following orders: -

Orders:

(1) Mention on 15/10/201

(2) defendant to file written statement of defence and Served the Plaintiff"

I find and hold that there is not on record an order that the Written Statement of Defence ought to be filed on or by 15/10/2019. It was a creation of counsel for the appellant. As I have said, he made this claim on 15/10/2019 a date when the defendant failed to appear. It is on the same date he also prayed for the case to proceed *ex partes* as the defendant had neither appeared nor filed Written Statement of Defence as ordered which prayer the learned magistrate erroneously granted. In my view, it was on this date and the above explained state of things which created the original sin in this case. An order for *ex partes* hearing was made when the pleadings where even not completed. This was an error on part of the trial magistrate at the instigation of counsel for the appellant. This order was finally vacated and it is subject of the complaint in the first ground of appeal.

Before disclosing the nature of the complaint in the first ground of appeal, it is befitting to give a background of incidents that constituting the complaint.

On 28/10/2019 counsel for the appellant complained about the filing of the Written Statement of Defence while orders to proceed *ex partes* had been granted. On the same date counsel for the respondent prayed that orders for ex partes hearing be vacated. The learned magistrate granted the prayer. Being unappealable interlocutory order, the appellant proceeded with the case but this is now a subject of complaint in the first ground of appeal which reads: -

> *'That the trial District Court erred on point of law in vacating its former order of hearing the suit ex partes in contravention of the law'.*

I hold a firm view that upon oral prayer by the counsel for the appellant, the learned trial magistrate was entitled to vacate an order which was founded on a misapprehension of facts on record and misinformation from the counsel for the appellant. The order was void ab initio. Considering the foregoing exposition of facts from the evidence on record, I find and hold that the first and second grounds of appeal are without merits.

When the case was called for hearing, counsel for the appellant dropped the third ground of appeal which I find no reason to reproduce. The fourth and last ground of appeal reads: -

> *'That the trial District Court grossly erred on both point of law and fact in holding that the appellant failed to prove his claim to the standard required in civil cases'.*

This ground necessitates recounting of the facts of this case which are that the appellant and the respondent are relatives who lives on adjoining lands. Sometimes in 2014, the respondent reported to the police against the appellant allegations of criminal trespass. Consequent to that, the appellant's son was arrested and detained in police custody. This son testified at the trial court as PW2. He was later charged together with the appellant in the Primary Court of Kigoma District at Ujiji in Criminal Case No. 556/2014 on the offence of Criminal trespass. Both were convicted and accordingly sentenced to different sentences. Due to the delay to file an appeal, they applied to the District Court for orders extending time to appeal out of time which was dismissed. On appeal to the High Court, the High Court found that the criminal charge was preferred prematurely because

Nyeta

there was still pending in court a land dispute between the parties. Since the criminal proceedings at the primary court was not an issue before it, the High Court exercised its revisionary powers to nullify those proceedings. The claim for malicious prosecution is based on this finding of the High Court.

In his judgment, the learned trial magistrate applied his mind to the evidence on record against the ingredients of the tort of malicious prosecution and found that it is not true that the appellant's prosecution was without a reasonable and probable cause nor was it malicious. The plaint was dismissed with costs, hence, this appeal.

In his submissions, counsel for the appellant argued that since the High Court held that the criminal charge was premature, then the prosecution was actuated with malice. He also complained about the rejection to admit court judgments relating to the dispute between the parties on the ground that they were photocopies and refusal to take judicial notice of their existence.

In reply Mr. Sadiki submitted that malice was not proved and the fact that there was a dispute between the parties was not proved because the relevant court decisions were not admitted in court for being photocopies.

That court judgments are not among documents which a court can take judicial notice of their existence.

To start with, it was an error on part of the trial court to refuse to admit judgments of the courts on ground of being photocopies. Where a photocopy judgment sought to be tendered involves same parties to the case, that judgment is admissible because it falls under the exception to the general rule on admissibility of secondary evidence under section 67 (1) (a) (i) of the Evidence Act [Cap. 6 R.E. 2019].

The section reads: -

> *"67-(1) secondary evidence may be given of the existence, condition or contents of a document in the following cases: -*
>
> *(a) When the original is shown or **appears** to be in the possession or powers of;*
>
> *(i) The person against whom the document is sought to be proved".*

A party to court proceedings is entitle to a copy of the judgment thereof. Therefore, the respondent is deemed to possess the original court judgment

Ngeta

in all proceedings involving them. It follows, therefore, that the rejection to admit those judgments could have been a reason for ordering a retrial on ground of prejudicing the appellant's case. However, despite rejecting the judgments, the contents thereof are clear in the evidence of PW2 and the appellant. The trial magistrate considered such contents in his decision therefore the appellant cannot claim to have been prejudiced by the rejection. After considering such evidence the learned trial magistrate held:-

> *'I have examined the evidence adduced by the plaintiff and I have come to the conclusion that the plaintiff has failed to establish on the balance of probability that the defendant prosecuted him before the primary court without reasonable and probable course (sic) and with malice. This is because the facts that the proceedings and orders of the primary court were nullified by the High Court via it (sic) revisionary power that did not make the evidence adduced by the defendant before the trial court false and improbable'.*

I can't agree more with the learned trial magistrate. The High Court decided the case on its technical aspect not on merits. Strictly speaking, therefore, the proceedings cannot be said to have been terminated in favour of the appellant where the case was not decided on merits. The fourth complaint has no merits too.

In the event, I rule that the whole appeal had no merits. I accordingly dismiss it. Since the parties are relatives, in order to give them a chance to reflect on their relationship, I give no orders as to costs.

I.C. Mugeta

Judge

25/11/2020

Court: Judgment delivered in chambers in the presence of the appellant and the respondent in person and Masendeka Dayanse, counsel for the appellant and Sadiki Aliki Counsel for the respondent.

Sgd: I.C. Mugeta

Judge

25/11/2020