

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

CIVIL APPEAL NO.8 OF 2017

(Arising from civil case No.1 of 2017, the District Court of Shinyanga)

YUNISI SAMSON.....APPELLANT

VERSUS

DANIEL MFUNGO.....RESPONDENT

JUDGMENT

23/3&17/4/2020

G.J.Mdemu,J.

In the course of exchange of pleadings in civil case No.8 of 2017, upon being served with a plaint, the Respondent Defendant Daniel Mfungo in the usual procedure of filing written statement of defence (WSD), raised the following points of preliminary objection on 23rd of January , 2017 in the trial court:

- 1. The cause of action and the claimed reliefs wherefrom ousts the jurisdiction of this honourable court. Alternatively, the reliefs claimed are premature and misplaced.*
- 2. This suit is incompetent before this honourable court for improper verification clause.*
- 3. That, contents of paragraph 10 & 11(a) of the plaint are offensive worth to be expunged from the pleading.*

On 11th of April 2017, the three preliminary objections were determined by the trial court. In the ruling delivered on 27th of April 2017, the trial court did uphold the said preliminary objections in the following manner as at page 6 of the proceedings:

“Since the Plaintiff claimed the costs of the suit without the same to have been finalized and costs to have been granted; and since also the plaintiff qualified the general damages as contrary to

O.VII R.7 of the Civil Procedure Code, Cap.33 RE 2002, I find that this point of preliminary objection has merit and the same is therefore upheld.

With regards to the third point of preliminary objection, it has already being shown that, the plaintiff herself conceded the same and went on to ask this court to expunge contents of paragraph 10 and 11(a) of the plaint. I hereby do the same as asked to do so.

From the foregoing, since it has already been found that the plaintiff's claim are premature and being misplaced, this court in totality upheld the defendant's objection and went on to dismiss the suit in its totality with costs."

The Appellant was aggrieved by this decision of the trial court, hence the present appeal on the following grounds:

- 1. That the hon. Resident Magistrate erred in law and in fact to uphold the preliminary objection which was totally not based on pure point of law.*
- 2. That the hon. Resident Magistrate erred in law and in fact for holding that the suit was misplaced and pre maturely brought before the court.*
- 3. That the hon. Resident Magistrate erred in law and in fact for holding that the Plaintiff Appellant conceded to the preliminary objection.*
- 4. That the hon. Resident Magistrate erred in law and in fact for failure to exercise properly the jurisdiction vested by the law.*

Before me on 23rd of March 2020, appeared Mr. Mponeja and Mr. Kiteja Charles, both learned Advocates representing the Appellant and Respondent respectively in arguing the instant appeal. At the commencement of hearing the appeal, Mr. Mponeja abandoned the 1st and 4th grounds of appeal.

Arguing the 2nd ground of appeal in support of the appeal, the learned counsel submitted that, the suit was not premature as the same arose on common tort of malicious prosecution and false imprisonment. He added that, the two may be filed on conclusion of filed suits leading to false imprisonment and malicious prosecution. He argued further that, in civil case No.1 of 2017, the Appellant was claiming compensation or damages following the decision of the court in Criminal Case No.37 of 2015 between Daniel Mfungo and Yunisi Samson. That criminal case was lodged in the Primary Court of Salawe. He added that, in that case, the Appellant was found guilty and sentenced to six months conditional discharge for obtaining goods by false pretences. She was successful in appeal No.2 of 2017 filed in the District Court, hence a claim on tort.

As to the 3rd ground of appeal, the learned counsel submitted that, the Appellant never conceded to the preliminary objection regarding paragraph 10 and 11(a) of the plaint. In this, he summed up that, there is nothing in the record indicating that, the said paragraphs of the plaint got expunged on the ground that the Appellant conceded. In totality, the learned counsel concluded that, there is merits in the instant appeal thus urged me to allow the same.

Resisting the appeal, Mr. Charles Kiteja observed in the 2nd ground of appeal that, in paragraph 11 of the plaint, the Appellant claimed Tshs.1, 200,000/ which was seized by the police, This to Mr. Kiteja is not the Responsibility of the Respondent. He stated further that, the Appellant also prematurely claimed costs of the case in criminal case No.37 of 2015 and criminal appeal No.2 of 2016. To him, the prayers were premature and therefore the trial court rightly found them misplaced.

With regard to the 3rd ground of appeal, the record at page 7 indicates that, the Appellant conceded to the preliminary objection and requested the court to expunge the same from the plaint. In this, he stated that, the Appellant should have filed bill of costs to allow the taxing master to entertain the matter. He thus concluded in his submission that, it is not correct that the Appellant did not concede and therefore the appeal be dismissed for want of merits.

In a brief rejoinder, Mr. Mponeja rejoined that, as the claim is on damages following conclusion of criminal cases, the issue of immaturity of the claims may not arise. He equally rejoined that, a claim cannot be directed to a police officer because the said officer acted on information supplied by the Respondent herein. He thought the nature of a claim on tort in the circumstances of this case; require the suit be determined to finality. This was all from what parties submitted regarding the instant appeal.

I have heard and considered submissions of both parties to this appeal and also had an opportunity to go through the record of the trial court that heard and determined the three preliminary objections. Commencing with the 2nd ground of appeal on immaturity or misplacement of the suit, I think the starting point should be on the reliefs claimed for. This was the basis of the first preliminary objection determined by the trial court. The reliefs in a suit for malicious prosecution filed to the District Court are contained in the following paragraphs of the plaint:

- a) A declaration that the défendant maliciously prosecuted and unlawfully detained the Plaintiff without reasonable and probable cause or even color of right which the prosecution was terminated in the plaintiff's favor.*
- b) Payment of all damages occasioned against the Plaintiff to an amount of Tanzanian shillings thirty two million (Tshs.32,000,000/=) being special ,general, aggravated and punitive damages as pleaded in paragraph 3 and 11.*
- c) Interests on the decretal sum at the rate of 12% per annum from the date of judgment till final settlement of the decree,*
- d) Costs of this suit.*
- e) Any other reliefs.*

These being the reliefs claimed for, and taking the basis of the preliminary objection on immaturity of the reliefs, I do not see the basis not only of the objection but also the submission of the learned counsel for the

Respondent and in the finding of the learned trial magistrate that, the reliefs as so raised are pre-mature. In the first place, this being a suit on malicious prosecution, the test among others, is that, there was institution of a criminal suit that ended in favour of the Plaintiff. In **Black's Law Dictionary, 5th Edition, 2004 at page 3041**, malicious prosecution is defined as:

1. *The institution of a criminal or civil proceeding for an improper purpose and without probable cause. • The tort requires an adversary to prove four elements: (1) the initiation or continuation of a lawsuit; (2) lack of probable cause; (3) malice; and (4) favorable termination of the lawsuit. Restatement (Second) of Torts §§ 674–681B (1977).* 2. ***The tort claim resulting from the institution of such a proceeding. • Once a wrongful prosecution has ended in the defendant's favor, he or she may sue for tort damages. — Also termed (in the context of civil proceedings) malicious use of process; (archaically) malicious institution of civil proceedings. Cf ABUSE OF PROCESS; VEXATIOUS SUIT. [Cases: Malicious Prosecution 16. C.J.S. Malicious Prosecution or Wrongful Litigation §§ 5, 23–24.](Emphasis supplied)***

In the instant appeal, according to paragraph 8 of the plaint, the Respondent instituted criminal case No.37 of 2015 against the Appellant and that the said suit ended in favour of the Appellant in criminal appeal No.2 of 2016. The Respondent to date never appealed. In my considered opinion, this alone entitles the Appellant to file a suit on malicious prosecution. Other elements such as probable cause, malice, etc will be proved at the trial as stated in the case of **James Funke Gwagilo vs The Attorney General (2001) TLR 455**, in which at page 463 it was observed that:

Concerning malicious prosecution, in order to succeed in a suit for damages, for this kind of tort, the plaintiff must prove;

- a) *That he was prosecuted by the defendant.*
- b) *That the prosecution ended in his favour.*
- c) *That the prosecution was conducted without reasonable or probable cause.*

d) That in bringing the prosecution, the defendant was actuated by malice.

Under the circumstances, I hesitate to concur with the Respondent's counsel that, the matter may end at the level of preliminary objection. Let the Appellant be put to prove his claim on the damages sought in the plaint resulting from malicious prosecution.

Having that in mind, I also become adamant to conclude, as the learned counsel for the Respondent did, that the reliefs sought for in the plaint, as stated above, were prematurely coached. I have no jurisdiction to determine and asses those damages or whether they have been properly pleaded or not, but it be suffice to state that, the Respondent's counsel missed some points to state that, the same may be claimed in a bill of costs. The concluded criminal cases in favour of the Appellant normally do not attract costs as to require compliance of the procedures on bill of costs in the taxing master's jurisdiction. I therefore find merit in the 2nd ground of appeal.

With regard to the 3rd ground of appeal, the major contention is that there is nowhere in the record the Appellant did concede to the preliminary objection as to require the expunging of paragraph 10 and 11(a) of the plaint from the pleadings. The learned counsel for the Respondent, regarding this matter, referred me at page 7 of the proceedings that the Appellant conceded to the preliminary objection. In that page it is stated as follows:

Your honor, with regards the third point of preliminary objection, I concede and let the same be expunged from my plaint. That is all

It is obvious that, the Appellant conceded, however his main concern is that, the ruling of the trial court did not expunge the two paragraphs in the pleadings. To verify this, I have perused the ruling of the learned trial magistrate and noted that, the said paragraphs got expunged from the pleadings. At page 6 of the ruling, the record reads:

With regards to the third point of preliminary objection, it has already being shown that, the plaintiff herself conceded the same and went on to ask this court to expunge contents of paragraph 10 and 11(a) of the plaint. I hereby do the same as asked to do so.

That being the case, the fact that the said paragraphs has been expunged does not close the chapter in respect of the claim of the Appellant. In that stance, I find the instant appeal has merit and is accordingly allowed to the extent as demonstrated above. Each part to bear own costs

Order accordingly.

Gerson J. Mdemu

JUDGE

17/4/2020

DATED at SHINYANGA this 17th day of April 2020.



Gerson J. Mdemu

JUDGE

17/4/2020