

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TANGA DISTRICT REGISTRY

AT TANGA

CIVIL CASE NO 06 OF 2020

HASSAN MOHAMED ABDALLAH.....PLAINTIFF

VERSUS

MOHAMED SALIM SAID.....1st DEFENDANT

RATCO LIMITED.....2nd DEFENDANT

RULING

Mansoor J

Date of Ruling: 13 May 2022

This ruling is with respect to a preliminary objection raised by the learned counsel for the respondent Mr. Bana on the prematurity of this case before the court. The factual background of the matter will be of value.

The plaintiff used to be an employee of the 2nd defendant as a General Manager. The 1st defendant is the managing director of the 2nd defendant company. On 16th July 2019 the plaintiff was criminally charged at the District Court of Tanga at Tanga vide Criminal Case No 94 of 2019 with the



offence of Stealing by officer of Company Contrary to section 272 and 258 (1) and (2) of the Penal Code, Cap 16 R.E 2002. According to the charge sheet on record, the plaintiff Hassan Mohamed Abdallah was indicted for stealing Tshs. Three Million Six Hundred Thousand (3,600,000/=) the property of the 2nd defendant, RATCO COMPANY LIMITED.

From the record, Criminal Case No 94 of 2019 ceased on 23/01/2020 by the charge being dismissed and accused discharged under Section 225 (4) and (5) of the Criminal Procedure Act, Cap 20 R.E 2002.

Following such a dismissal and discharge, the plaintiff filed this suit through his advocate Mr. Shukuru Khalifa complaining of Malicious Prosecution, praying for reliefs of; -

- 1. Payment of Tshs 800,000,000/= as general damages for malicious prosecution*
- 2. Payment of Tshs 200,000,000/= punitive damages*
- 3. Interest of 23% on the principal sum from the date of filing the suit to the date of judgment*
- 4. 7% interest on decretal sum from the date of judgment to the date of full payment*

5. Any other order that the court may deem fit and just to grant

The defendants having been served, came up with the first preliminary objection on the pecuniary jurisdiction of this court, the objection which was subsequently overruled with costs on 14th March 2022. On 21st March 2022 a second objection subject of this ruling was filed with regard to the prematurity of this case in the eyes of law. The defendants contended that the case at hand is filed prematurely as there is still a pending case in court regarding similar charges against the plaintiff.

When the matter came for hearing on 28th March 2022, Mr. Shukuru Khalifa, learned counsel for the plaintiff prayed that the preliminary objection be heard by way of written submission. There was no objection from the defendants and hence a schedule was set. The defendant was ordered to file their written submissions on or before 11th April 2022, reply by the plaintiff was to be filed on or before 25th April 2022, rejoinder (if any) was to be filed on 02nd May 2022.

The written submission in support of the preliminary objection was duly filed on 11th April 2022. Thereafter there was no reply or

anything filed by the plaintiff. The defendants' counsel filed a notice of default to that effect.

An Order for hearing the matter by way of written submissions is similar to an order for attendance in court for hearing as governed by Order IX of Civil Procedure Code, Cap 33 R.E 2019. Default to file submissions as per the order of the Court has the same effect as non-appearance of a party. It is a long-established practice in our courts that once a party has knowingly decided to ignore/or disregard the order of the Court for filing the written submission without good cause, he forfeits his right and has to bear the consequence.

Order IX Rule 5 of the Civil Procedure Code states; -

Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the court shall make an order that the suit be dismissed unless the defendant admits the claim, or part thereof, in which case the court shall pass a decree against the defendant upon such admission and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.'

Bringing the situation of this case into play, the order for written submissions was with regard to a preliminary objection filed by the defendants through their advocate, Mr. Bana. The Defendants in this sense are the ones who initiated the hearing of the Preliminary objection by their written submission in chief. The plaintiff was expected to defend his stance by filing a reply thereto. I need not overemphasize that the plaintiff's failure to file reply to written submissions means failure to oppose the preliminary objections raised by the defendants.

The plaintiff also failed to seek indulgence of the Court to extend the time if there was good reason for not adhering to the Court orders.

In one case of **P3525 LT Idahya Maganga Gregory v. The Judge Advocate General**, Court Martial Criminal Appeal No. 2 of 2002 (unreported) the Court held:

"It is now settled in our jurisprudence that the practice of filing written submissions is tantamount to a hearing and;

therefore, failure to file the submission as ordered is equivalent to nonappearance at a hearing or want of prosecution. The attendant consequences of failure to file

written submissions are similar to those of failure to appear and prosecute or defend, as the case may be."

With this observation, the submission by the defendant stands uncontested and will be regarded as such.

Records show that the case which the plaintiff complains of being maliciously prosecuted for is still pending in court as Criminal Case No 151 of 2020. This is so because Criminal Case No 94 of 2019 was not heard on merit. Its dismissal under Section 225(4) and (5) of the Criminal Procedure Act did and could not operate as a bar against subsequent charges based on similar facts. The discharge was not a bar to subsequent charge on the same facts, so it was not yet safe to say that the plaintiff was acquitted from the allegations.

To succeed in the suit of malicious prosecution, the plaintiff has to prove the existence of four elements constituting his course of action cumulatively. One, that he was prosecuted by the defendant in criminal proceedings, two, the defendant acted without reasonable or probable cause in initiating, prosecuting and/or continuing criminal proceedings, three, the defendant acted with

malice and four, the criminal proceedings terminated in the plaintiff's favour. See for instance:

James Funke Gwagilo v. Attorney General [2004] T.L.R 161 cited in **Shadrack Balinago v. Fikiri Mohamed @ Hamza @ 2 others**, Civil Appeal No. 223 of 2017 (unreported).

The criminal case was not prosecuted on merits and there was no proof that the defendants' criminal allegations before the District Court were false to the knowledge of the defendants and that the defendants have given the complaint without any reasonable and probable cause and with malice just to put the plaintiff herein to disgrace and loss. The criminal case at the district courts was either dismissed or discontinued by the order of the District Magistrate without being heard, and fresh charges over the same allegations have been lodged in court.

The law about malicious prosecution, and from the principles laid down in several decisions is that, in an action for malicious prosecution, the onus is upon the plaintiff to prove:

- (1) That he or she was prosecuted by the defendants.
- (2) That the proceedings complained of terminated in favor of the plaintiff, if from their very nature they were capable of so terminating.
- (3) That the prosecution was instituted against him or her without any reasonable and probable cause; and
- (4) That it was due to a malicious intention of the defendant and not with a mere intention to carry the law into effect. In this case there is no dispute that the decision of the District Court clearly shows that the criminal prosecution was not determined on merits, but they were discontinued. There is no finding of the court that the prosecution was instituted against the plaintiff without any reasonable and probable cause. There is also no finding of the court that the prosecution was due to a malicious intention of the defendants and not with a mere intention to carry the law into effect. Therefore, the ingredients of malicious prosecution were not established in this case.

Therefore, the decision of the District Court to the effect that there were false cases lodged against the plaintiff and based on which the subsequent proceedings were taken for malicious prosecution, cannot stand.

As held in the case of **Ahmed Chilambo vs. Murray and Roberts Contractors (T) Limited, Civil Case No. 44 of 2005,**

Manento J (unreported) at page 4, he said:

"Basing on the submissions of the learned counsels, it shows that the learned counsel for the plaintiff have deliberately avoided to submit on the issue of favorable termination of the criminal charge against the plaintiff and opted to deal with the false imprisonment, which he decided to use the term incarceration. As I have already said, the discharge of the plaintiff in the criminal charge is unfavorable on him because the termination of the criminal charge makes the charge pending. The discharge is not a bar to subsequent charge on the same facts, so it is not yet safe to say that the plaintiff is free from the allegations. He can be re-arrested and charged on the same facts. Such subsequent charging could even lead to conviction. Therefore, lack of an acquittal of the plaintiff, he

cannot successfully argue that he was maliciously prosecuted. For a tort of malicious prosecution to stand, there must be facts showing that the prosecution ended in favor of the plaintiff and short of those facts like in this case, it is difficult to say that there are facts constituting a tort of malicious prosecution."

I fully subscribe to the decision of Hon Judge Manento in the above cited case, as in the present case as well there was no proof of the ingredients of malicious prosecution, the mere presentation of a false complaint "if any" would not necessarily be a basis for a suit for malicious prosecution.

In my view, the defendants' objection is correct and therefore this case is a wastage of time, energy, and resources of this court. The preliminary objection is hereby sustained and this, Civil Case No 06 of 2020 is accordingly struck out with costs.

**DATED AND DELIVERED AT TANGA THIS 13TH DAY OF MAY
2022**



Latifa Mansoor
LATIFA MANSOOR

13TH MAY 2022