

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA REGISTRY

AT IRINGA

CIVIL APPEAL CASE NO. 02 OF 2023

(Arising from Civil Case No. 09 of 2021 in the District Court of Iringa at fringe)

MUSSATINDWA.....APPELLANT

VERSUS

EVA MBAMILA ...RESPONDENT

JUDGMENT

Date of Last Order: 20.06.2023

Date of Judgment: 14.07,2023

A.E. Mwipopo, J.

Musa Tindwa, the appellant herein, was sued by Eva Mbamila, the respondent, before Iringa Urban Primary Court in Criminal No. 157 of 2021 for trespassing contrary to section 299 of the Penal Code, Cap 16 R.E 2019. After hearing the evidence from both sides, the trial Primary Court found the appellant not guilty of the offence. The Primary Court acquitted the appellant on the ground that the offence of trespassing was not proved as there is a land ownership dispute. The Primary Court advised the respondent to institute a land case before the Ward Tribunal or DLHT i

with jurisdiction to determine the land matter in dispute. Following the decision of the Primary Court, the appellant instituted Civil Case No. 09 of 2021 before the Iringa District Court for malicious prosecution against the respondent. The appellant was praying for the following reliefs in the plaint:-

1. *Payment of general damages at the tune of Tshs. 100,000,000/=.*
2. *Payment of Tshs, 60,000,000/= as compensation for loss of expectation of life.*
3. *Payment of interest on the decretal amount at the Court's rate from the date of judgment to the date of payment in full.*
4. *Costs of this suit.*
5. *Other reliefs that the Court may deem right and just.*

On 20.06.2022, the appellant was granted leave to amend the plaint by the trial District Court and on 27.06.2022, he filed in Court the amended plaint. In the amended plaint, the appellant was praying for the following reliefs:-

- i. Payment of general damages at the tune of Tshs, 50,000,000/=.*
- ii. Payment of interest on the decretal amount at the Court's rate from the date of judgment to the date of payment in full.*
- Hi. Costs of this suit.*
- iv. Other reliefs that the Court may deem right and just.*

The District Court heard the evidence from both sides and dismissed the case for wants merits. The appellant was not satisfied with the decision

of the District Court and filed this appeal containing four grounds of appeal as follows hereunder:-

- a. That the trial Magistrate erred in fact and law on the point that criminal case No. 157 of 2021 was not determined on merits and was dismissed for technicalities as stated in the judgment.*
- b. The trial Magistrate erred in fact and law by failing to evaluate well the evidence adduced by the parties as to how and when Aimano Mbamiia acquired the land with disputed boundaries.*
- c. The trial Magistrate erred in law and fact by deciding the case in favour of the defendants while the defendant had no probable cause against the appellant as she was neither the owner of the disputed land nor a legal representative when initiated Criminal Case No. 157 of 2021.*
- d. The trial Magistrate erred in law and fact by relying on the first plaint without regarding the amended plaint presented by the plaintiff during the trial.*

At the hearing, Advocate Geoffrey Watson Mwakasege appeared for the appellant, whereas Advocate Leonard Lazaro Sweke appeared for the respondent. The hearing proceeded through oral submission.

Advocate Mwakasege's submission on the 1st ground of appeal was that in the cases of malicious prosecution, the plaintiff has to prove that he was prosecuted, the decision of the Court was in his favour, the defendant initiated the case maliciously, and the absence of probable cause to institute

the suit. To support his argument, he cited the case of **Shadrack Balinago vs. Fikiri Mohamed @ Hamza and 2 Others**, Civil Appeal No. 223 of 2017, Court of Appeal of Tanzania at Mwanza (unreported), on pages 17 and 18 of the judgment. He went on contending that the decision of the District Court shows on page 14 that the case in the Primary Court was not heard on merits, and the District Court does not know if the case was heard on merits what will be the decision. It proves that the matter was not determined on merits. It was wrong on the trial court's part to hold that the malicious prosecution case was not proved as the Criminal case before the trial Primary Court was heard on merits, as seen on page 6 of the judgment of the Primary Court in Criminal Case No. 157 of 2021. Thus, the District Court erred to hold that the decision of the Primary Court was determined on technicalities.

On the 2nd ground of appeal, the appellant's submission was that the District Court Magistrate believed the dispute before the Primary Court was a Land Case."Yet, the respondent failed to prove how he obtained the land in dispute. The respondent claimed that he was the one who gave the land to Almano Mbamila, who is his young brother. It is this land which is the cause of the dispute. The evidence from the chairman of the village shows that

Almano Mbamila got the land from Watende Kiduko. It is a contradiction between the evidence of the respondent and his witness. The respondent had no sufficient knowledge of the land in dispute. It was wrong for the respondent to institute the land case in Primary Court as the evidence proves that the respondent does not know the boundaries of the land in dispute.

On the 3rd ground of appeal, the counsel said that the respondent had no probable cause against the appellant when instituting a criminal case in the Primary Court. The respondent did not show that he was the owner of the land in dispute. The respondent did not tender any exhibit to show that he was permitted to institute the case on behalf of the owner of the land. The same was done for evil intentions. The act of instituting the suit has caused a loss to the appellant.

On the last ground of the appeal; the appellant submitted that the court decision is based on the facts deposed in the first plaint. However, on 27/02/2022, the appellant amended the plaint. It was wrong for the Hon. Trial Magistrate to rely In Its judgment on the 1st plaint, which was amended.

In his reply, Advocate Sweke submitted the 1st, 2nd and 3rd grounds of appeal jointly. He said that the case originated from the malicious prosecution's claims. The appellant had the duty to prove that Criminal Case No. 157 of 2021 was instituted maliciously. The appellant failed to prove that there was malicious prosecution. The appellant had the burden to prove his case as it was held in the case of **Baleria Karangirangi vs. Asteria Nyalwambwa** 2019 TZCA 51. The Primary Court found on page 6 of the judgment that Criminal Case No. 157 of 2021 at the Primary Court was about land ownership. The Primary Court advised the appellant to take the case to the Ward Tribunal or the District Land and Housing Tribunal. The matter was not determined on merits. Even if it was decided on merits, there is still nothing to prove that there is malicious prosecution. The evidence established a land dispute between the appellant and the respondent. The respondent in the said Criminal Case instituted the case on behalf of his young brother residing outside the country. The same is on the record of the

Primary Court proceedings on page 2 of the judgment.

The counsel said that the appellant had a duty to prove four elements in the case of malicious prosecution, as stated in **Yonah Ngassa vs. Makoye Ngassa** (2006) TLR 123. The elements include the proceedings instituted or continued by the defendant, the defendant acting without reasonable or probable cause, the defendant acting maliciously, and the proceedings terminated in the plaintiff's favour. The same position was stated in the case of **Mbowa vs. East Mango Administration** (1972) E.A. 353. Another case is **Wosia Galata vs. Gibson Zumba Mwasote** (1988) TLR 154 and **Edward Celestian and Others vs. Deogratias Paulo** (1982) TLR 347. The appellant failed to prove that the respondent prosecuted him maliciously. Thus, the 1st) 2nd and 3rd grounds of appeal have no merits.

Regarding the 4th ground of appeal, it was the respondent's submission that there was misdirection on the part of the trial District Magistrate who relied on the 1st plaint in his judgment. The appellant amended the plaint after the leave of the trial District court was granted.

Even the framing of issues was done as per the amended plaint. Despite the misdirection, the changes brought by the amended plaint were on the claimed amount. In the original plaint, the appellant claimed 100, 000, 000/=

shillings as general damages, while in the amended plaint, the appellant claimed for payment of 50,000,000/= shilling as general damages. The facts and prayers remained the same. The decision will remain the same even if the trial District Court did not misdirect itself. The misdirection by the trial Magistrate does not prejudice the appellant in any way. The Court has to invoke sections 3A (1) and (2) and section 3B (l)(a)(b) and (c) of the Civil Procedure Code Act, Cap. 33 R.E. 2019.

In a short rejoinder, the counsel for the appellant reiterated his submission in chief, and he added further that it is on record that the appellant was prosecuted in the Primary Court by the defendant. The decision was in the appellant's favour. Thus, those two elements were proven. The only disputed element was whether the appellant was prosecuted maliciously. Before the institution of the criminal case in the Primary Court, there was no dispute over the ownership of land between the appellant and the respondent. The trial Primary Court determined the criminal case on merits contrary to what the respondents counsel submitted.

Having heard the respective submissions from both parties, the issue to be determined here is whether this appeal has merits.

In determining this appeal, I will start with the last ground of appeal as

it concerns the irregularity in the composition of the judgment. The appellant alleged that the trial court erred in relying on the first plaint in its judgment without regarding the amended plaint presented by the plaintiff during the trial. He said that the Court decision is based on the facts deposed in the first plaint amended on 27/02/2022. It was wrong for the Hon. Trial Magistrate to rely in its judgment on the 1st plaint, which was amended. In his reply, the counsel for the respondent said that the misdirection did not prejudice the appellant as the changes brought by the amended plaint were on the claimed amount only. He prayed for the Court to invoke sections 3A (1) and (2) and section 3B (1) (a)(.b) and (c) of the Civil Procedure Code Act, Cap. 33 R.E. 2019.

It is settled that once the pleadings are amended, that which stood before the amendment is no longer material before the Court. The position

was stated by the Court of Appeal in several cases, including the case of **Airtel Tanzania Ltd vs. Ose Power Solutions Ltd**, Civil Appeal No. 206 of 2017, Court of Appeal of Tanzania at Dar Es Salaam, (unreported); **Morogoro Hunting Safaris Ltd vs. Halima Mohamed Mamuya**, Civil Appeal No. 117 of 2011, Court of Appeal of Tanzania, unreported); and **General Manager, African Barrick Gold Mine Ltd vs. Chacha Kiguha and 5 Others**, Civil Appeal No. 50 of 2017, Court Of Appeal of Tanzania, (unreported). It means that the trial Court was supposed to consider the facts deposed and reliefs prayed in the amended plaint after the amendment was made.

Upon perusal of the trial District Court's judgment, I found, as the appellant's Advocate put up, that the trial Magistrate determined the case while referring to the 1st plaint. On the 1st page of the judgment, the trial Court referred to the relief stated by the appellant in the original plaint. However, the trial District Court proceedings show that on 27/06/2022 the appellant amended the plaint. In the said amendment, the appellant prayed for the relief of general damage of Tshs: 50,000,000/=, payment of interest to the decretal amount and costs of the suit. The major change in the amended plaint is changing the prayer for payment of general damages at

the tune of Tshs. 100,000,000/= in the original plaint to Tshs. 50,000,000/=, and the abandonment of the prayer for the payment of Tshs. 60,000,000/= as compensation for loss of expectation of life. There was also a change of name and address of the counsel for the appellant in the 1st paragraph of the amended plaint. The remaining facts deposed are almost the same in content.

The trial District Court in its judgment considered the evidence adduced by witnesses from both parties and decided that the respondent had reasonable justification for placing criminal charges against the appellant in the Primary Court. It is clear that apart from referring to the relief stated in the first plaint on the 1st page of the judgment, nothing in the decision shows that the trial Court relied on other facts deposed in the 1st plaint. The judgment is based on the issue framed and on the evidence adduced by both sides. I agree with the respondent's counsel that the trial Magistrate's misdirection does not prejudice the appellant. The trial District Court properly determined whether the appellant was maliciously prosecuted, which is the basis of the suit instituted by the appellant. Thus, I find the ground to be wanting merit, and the same must fail.

Whether or not the appellant proved the malicious prosecution case on the 1st, 2nd, and 3rd grounds of appeal, the law is settled that a party suing for malicious prosecution must prove four ingredients to succeed. The ingredients include that the proceedings were instituted or continued by the defendant, the defendant acted without reasonable and probable cause, the defendant acted maliciously, and the proceedings terminated in the plaintiff's favour. See. **Shadrack Balinago vs. Fikiri Mohamed @ Hamza and 2 Others**, (supra); **Paul Valentine Mtui and Another vs. Bonite** Bottlers Limited, Civil Appeal No. 109 of 2014, Court of Appeal of Tanzania, (unreported); and **Yonnah Ngassa vs. Makoye Ngassa**, (supra).

There is no dispute that the respondent instituted a Criminal Case No. 157 in the Irihga Urban Primary Court for trespassing against the appellant, and the case ended in the appellant's favour. It means the two elements of proving a malicious prosecution case present. There is no dispute that the appellant was sued by respondent in a criminal case and the decision was on appellants favour. The remaining elements to be determined were if the defendant acted without reasonable and probable cause and if the defendant acted maliciously. The appellant's counsel was of the view that 12

the criminal case before the Primary Court was determined on merits, there was no evidence to prove the owner of the land in dispute, and the respondent had no locus to institute the criminal case since he was not the owner of the land in dispute.

The respondent's counsel, in his reply, said that the Primary Court found in its judgment that the Criminal Case was about the ownership of land, and it advised the appellant to take the case to the Ward Tribunal or the District Land and Housing Tribunal. Even if the criminal case was decided on merits, there is still nothing to prove that there is malicious prosecution. The evidence proved a land dispute between the appellant and the respondent. The respondent in the said Criminal Case instituted the case on behalf of his young brother residing outside the country.

I have thoroughly read the judgment of the Iringa Urban Primary Court in Criminal Case No 157 of 2021. The decision of the Primary Court shows that the appellant was prosecuted and acquitted of criminal trespassing. The reason for acquitting the appellant provided by the Primary Court in the judgment is that it has no jurisdiction as it is a land dispute. The Primary Court believed that the same was supposed to be referred to the Ward

Tribunal or District Land and Housing Tribunal for its determination. The Primary Court's decision proves that the matter was not determined on merits after it found out it had no jurisdiction to decide the land dispute. The Primary Court even advised parties to institute a land dispute in land Courts. In such situation, there was no need for the District Court to determine the proof of ownership of the land in dispute in a malicious prosecution case as alleged by the counsel for the appellant. The District Court was supposed to determine whether or not the defendant without reasonable and probable cause acted maliciously, and the same was done.

The Primary Court judgment and the respondent's testimony in the District Court show that the respondent instituted the criminal case under the power of attorney. Nevertheless, the Primary Court Criminal Procedure Code, which is the 3rd Schedule to the Magistrates' Courts Act, Cap. 11 R.E. 2019, provides in sections 3 and 8 that any person may lay information to the Primary Court concerning or accusing a person of having committed the offence triable by Primary Court. Thus, the claim that the respondent has no locus has no basis. Any person is allowed to lay information to the Primary Court accusing a person of committing an offence triable in the

Primary Court. Even without power of attorney, respondent is allowed to lay information about the offence committed to the Primary Court.

Therefore, I'm satisfied that the whole appeal lacks merits, and I dismiss it with cost. It is so ordered accordingly.



A handwritten signature in blue ink, consisting of stylized, flowing letters, positioned above the printed name.

A.E. MWIPOPO

JUDGE

14/07/2023