IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB REGISTRY

AT ARUSHA

CIVIL CASE NO 11 OF 2021

ELIAS MASIJA NYANG'ORO ..... 1ST PLAINTIFF

EDNA ELIAS NYANG'ORO ..... 2ND PLAINTIFF

FUN HILL PARK AND

RECREATION CENTER LIMITED..... 3RD PLAINTIFF

VERSUS

TANZANIA DISTILLERS LIMITED ..... DEFENDANT

JUDGMENT

17th July & 04th September, 2023

KAMUZORA, J.

The Plaintiffs' claims are founded on malicious prosecution of the 1st and 2nd Plaintiffs. The Plaintiffs claim against the Defendant for payment of Tshs 15,077,980,978 as special damages resulting from loss suffered due to closure of business upon malicious prosecution of the 1st and 2nd Plaintiffs, payment of commercial interest at the court rate of 12% on the decretal amount from the date of judgment till payment is made in full. Other claims are payment of general damages for wrongful arrest and malicious prosecution of the 1st and 2nd Plaintiffs to be assessed by this court, payment of punitive damages as may be

assessed by this court, costs of the suit and any other relief that this court deems fit and appropriate to grant.

Briefly, the facts grasped from the pleadings and evidence reveals that the 1st and 2nd Plaintiffs are the directors, shareholders and employees of the 3rd Plaintiff which is a liability company incorporated herein Tanzania under the Companies Act. The 3rd Plaintiff owns the factory located at block C Njiro Area in Arusha City and it deals with manufacturing and sale of alcohol gin products by the name of Wakawaka. It was alleged that the 1st and 2nd Plaintiffs were arrested and charged before the Resident Magistrate court of Arusha at Arusha in Criminal case No. 138 of 2018 for the offence of counterfeiting trademarks with intent to defraud Konyagi trademark. The charge laid against the 1st and 2nd Plaintiffs were dismissed for want of prosecution. It is from that aspect the 1st and 2nd Plaintiffs claim that they were maliciously arrested, detained and prosecuted by the Defendant. That, their arrest occasioned loss to the 3rd Plaintiff as they were forced to close the 3rd Plaintiff's business.

The Defendant on his part refuted the Plaintiffs' claims on account that the arrest, arraignment and charges were done by the police and

that the order of the closure if issued, was not attributed by the Defendant.

As a matter of legal representation, the Plaintiffs were ably represented by Mr. Jafari Suleiman, learned advocate while the Defendant enjoyed the service of Mr. Lubago Shiduki, learned advocate. The following are issues that were proposed and agreed by parties: -

1) *Whether the 1st and 2nd Plaintiff were maliciously prosecuted by the Defendant.*
2) *Whether the 1st and 2nd Plaintiff suffered damages from malicious prosecution.*
3) *Whether as a result of malicious prosecution of the 1st and 2nd Plaintiff, the 3rd Plaintiff factory situated at Block C Njiro- Arusha was closed.*
4) *Whether the Defendant is liable to the alleged closure of the 3rd Plaintiff's factory.*
5) *Whether the 3rd Plaintiff suffered damage at the tune of Tshs 15,077,980,978.25*
6) *To what reliefs are parties entitled.*

In proving their case, the Plaintiffs presented three witness; PW1 Elias Masinja Nyang'oro, PW2 Edna Elias Nyan'goro and PW3 Grace Charles Mchome and 8 exhibits were tendered before this court. On the defence side, only one witness DW1 Michael Mrema testified and no exhibit was tendered. After the closure of hearing, parties opted to file

their closing submissions and the same will be taken on board by this court in its determination.

Starting with the first issue as to whether the 1st and the 2nd Plaintiffs were maliciously prosecuted by the Defendant, the Plaintiffs' evidence reveals that the 1st and 2nd Plaintiffs were arrested and charged for the offence under the Penal Code which is counterfeiting Trade Mark of Konyagi Product. It is the Plaintiffs' claim that the Defendant initiated a complaint maliciously that aimed at arresting the 1st and 2nd Plaintiffs and the charge was laid against them as evidenced by exhibits PE5 (charge sheet). That, as per exhibit PE6 (Order in Criminal case No. 138/2019), the charge was dismissed and the Plaintiffs were discharged for want of prosecution.

On the defence side, the defence witness testified that nothing that links the Defendant with the Plaintiffs arrest as the arrest and prosecution was done by the proper authority. The Defendant refutes the claim that it maliciously prosecuted the Plaintiffs as there is no proof that the Defendant reported the matter to the Police or any other lawful authority. The Defendant also stated that, the dismissal of the criminal case was a technical one, that is, failure to prosecute the matter hence no malicious prosecution was proved.

As per exhibit PE5 and PE6, there is no dispute that the 1st and 2nd Plaintiffs were arrested and charged for criminal case. It is clear that the case was not heard on merit as the charge was dismissed for want of prosecution and the accused persons (1st and 2nd Plaintiffs herein) were discharged. The pertinent issue is whether the said act amounted to malicious prosecution by the Defendant.

The legal principles governing malicious prosecution were well discussed by Chipeta, J. in the case of **Jeremiah Kamama Vs. Bugomola Mayandi** [1983] TLR 123. According to this case, for a suit for malicious prosecution to succeed the Plaintiff must prove simultaneously the following elements, **one**, that he was prosecuted; **two,** the proceedings complained of ended in his favour, **three,** the Defendant instituted the prosecution maliciously, **four,** there was no reasonable and probable cause for such prosecution; and **five,** the damage was occasioned to the Plaintiff. Those five elements constitute if proved simultaneously amount to malicious prosecution. In testing the above elements, this court will be guided by the evidence in record.

Starting with the first and second elements, it is undisputed that the 1st and 2nd Plaintiffs were charged for criminal offence and the charge was dismissed for want of prosecution. In their evidence and closing

submission, the Plaintiffs claimed that they were prosecuted but the defence side in their evidence and closing submission considered the Plaintiffs' alignment as not prosecution. The counsel for defence was of the view that, prosecution requires hearing of evidence and deliverance of judgment. To him, since the Plaintiffs were discharged on technical ground of failure to present witness, it cannot be said that the matter was determined to finality in favour of the Plaintiffs.

Basically, prosecution is the action of charging someone with a crime and putting that person on trial. In legal dictionary, prosecution refers to **charging** and **trying** the case against a person accused of a crime. Prosecution therefore entails hearing and determining the case on merit. Where there is no trial, it cannot be said that someone was prosecuted. For instance, where the charge is withdrawn or dismissed for want of prosecution, that does not amount to prosecution as it can be refiled in court.

In the matter at hand, although the 1st and 2nd Plaintiffs were charged for criminal offence before the court, they were discharged as the offence was not prosecuted against them hence, the matter was not heard on merit. For a matter to be referred as concluded, it requires a full trial and judgment to that effect. In other words, the manner under

which the accused were release does not create absolute determination of the matter in their favour. In that regard, the first and second element are not proved for there was no conclusive prosecution that ended in favour of the 1st and 2nd Plaintiffs.

Assuming that the case was prosecuted to its finality, the question that follow is whether the Plaintiffs' prosecution was malicious. This takes me to the third element which requires the Plaintiffs to prove that the Defendant instituted the case and prosecuted the Plaintiffs maliciously. In his evidence PW1 testified that in August 2015 he was informed by PW2 that there were people who went to their factory and introduced themselves as Michael Mrema, the Zonal Manager of Tanzania Distillers Limited ((TDL) (the Defendant)), Salvatory Rweyemamu, plant manager of Tanzania Breweries (TBL), KK Security guards and police officers. Upon his arrival to the factory, he was ordered to sit down together with others. They were sent to the police station and charged for making counterfeit products. They spent the night at the police station and on the next day, they recorded their statement and were released on bail. They were then escorted to their factory where they met Mr. Njenje who was the security officer of the Defendant and Mr. Mrema. That, search was conducted and thereafter,

they were ordered by the Defendant's officials to close the factory despite of having all necessary documents from TFDA, TBS and all permits.

PW1 further testified that in April 2016, one police officer went to his factory accompanied with five people from different government agencies such as; Tanzania Revenue Authority (TRA), Tanzania Intelligency and Security Services (TISS), Director of Public Prosecution (DPP), Prevention and Combating of Corruption Bureau (PCCB) and Director of Criminal Investigation (DCI). They introduced themselves as special task force team and they interrogated the 1st and 2nd Plaintiffs on the issue of counterfeiting Konyagi trademark. That, they also collected documents from the factory but they never sent them feedback.

PW1 further testified that in March 2019, they were arrested again and detained at the police station for the same issue that occurred three years back. That, they were sent to court and charged in Criminal Case No. 138 of 2018 for the offence of counterfeiting Konyagi trademark. To him, the officers of the Defendant initiated their arrest, incarceration and malicious prosecution despite knowing that the 3rd Plaintiff had all valid documents relating to manufacturing of Wakawaka Gin. He believes that the Defendants masterminded harassment, arrest, detention and

malicious prosecution of the 1st and 2nd Plaintiffs resulting to mental anguish, loss of business, goodwill, financial loss, esteem and reputation. The evidence of PW1 is similar to that of PW2 in most aspect and similar to that of PW3 in relation to arrest, search and closure of the factory.

On the defence side, the testimony by DW1 Michael Mrema is that the Defendant is not responsible for arrest, detention and prosecution of the 1st and 2nd Plaintiffs. That, the Defendant being a private entity does not have control over the government agencies and is not entitled to conduct search or arrest individuals or order for closure of any business. He added that there is no evidence proving that the 3rd Plaintiff owns the alleged factory because the registration documents presented in court referred another company in the name of Romabel Investment Limited.

Looking into the Plaintiffs' evidence, this court is satisfied that it does not link the Defendant with the responsibility for arrest, detention and prosecution of the 1st and 2nd Plaintiffs. I say so because, while PW1 claim that they were arrested because the Defendant's officials reported them, there is no evidence on who reported the matter at the police station and whether the reporter of the incident at the police station was

related in any way with the Defendant. In this, I agree with the submission by the counsel for the Defendant that there is no any tangible evidence proving that Plaintiffs' prosecution was initiated by the Defendant leave alone the malice part of the prosecution.

In his submission, the counsel for the Plaintiff mentioned that the 1st and 2nd Plaintiffs were arrested by the police but he did not point out any evidence proving that the Defendant was responsible to reporting the Plaintiffs at the police station. DW1 Michael Mrema was an employee of the Defendant and he was mentioned as among the people who were present at the factory at the time the Plaintiffs' arrest. When he was cross examined, he claimed that he was called by police in their operation looking for counterfeit products. That, since he was sales manager of the Defendant, he was asked to identify products but he did not know the owner of the factory. The fact that the Defendant's officer (DW1) was present at the time of their arrest does not verify that the police search was based on the report made by the Defendant or that they were in their normal duties. Thus, unless there is evidence to that effect, it cannot be said that the Defendant was responsible for initiating the Plaintiffs' arrest.

It must be noted that DW1 did not deny being present but stated that he was just called by police who were searching for counterfeit products for purpose of identifying the products since he was sales manager of the Defendant. PW1, started that on the date of their arrest apart from the Defendant's officials there were also officers from TBL. He did not state the reason why they did not suspect those officers as being responsible to reporting them for producing counterfeit products. It also seems that the Defendant's officers were seen at the time of fist arrest and search of the Plaintiffs in August 2015. However, there is no evidence showing that the subsequent investigation process involved the Defendant. PW1 testified that in April 2016 one police officer went to his factory accompanied with five people from different government agencies such as; Tanzania Revenue Authority (TRA), Tanzania Intelligency and Security Services (TISS), Director of Public Prosecution (DPP), Prevention and Combating of Corruption Bureau (PCCB) and Director of Criminal Investigation (DCI). They introduced themselves as special task force team and they interrogated the 1st and 2nd Plaintiffs on the issue of counterfeiting of Konyagi trademark. That, they also collected documents from the factory but they never sent them feedback. He did not mention if they informed him that they were

working on the allegation reported by the Defendant to those authorities.

Similarly, PW1 also testified that in March 2019, they were arrested again and detained at the police station for the same issue that occurred three years back and they were sent to court and charged in Criminal Case No. 138 of 2018 for offence of counterfeiting Konyagi trademark. He did not mention if the Defendant was the complainant to that matter. Thus, the contention that officers of the Defendant initiated for the Plaintiffs' arrest, incarceration and malicious prosecution is unproven. There is no evidence proving that the Defendant knew that the 3rd Plaintiff had all valid documents relating to manufacturing of Wakawaka Gin and still reported the Plaintiffs for a criminal offence. For that reason, it cannot be said that the Defendant masterminded harassment, arrest, detention and malicious prosecution of the 1st and 2nd Plaintiffs. Since the Plaintiffs are the ones alleging that their arrest was triggered by the Defendant, it was their duty to prove so. I therefore find the third element unproven.

On the fourth element, I refer my discussion on the first three elements. In addition, it is my considered view that much as there is no evidence proving that the Defendant initiated the Plaintiffs' prosecution,

whether the Plaintiffs' prosecution was unreasonable or without probable cause, the Defendant cannot be held responsible.

In that regard, I find that elements of malicious prosecution were not simultaneously proved by the Plaintiffs against the Defendant hence, no civil liability is established against the Defendant. The first issue is therefore answered in negative.

Having concluded that the claim for malicious prosecution was not proved, it becomes obvious that damage suffered by Plaintiffs if any, cannot be tied to the Defendant. It must be noted that, damages claimed herein are linked to malicious prosecution which as elucidated above, it was not proved. Thus, whether the 3rd Plaintiff's factory was closed, the Defendant cannot be held liable for the closure. As deliberated above, there is no evidence linking the Defendant with the closure of the factory. There is no any official document directed to the Plaintiffs requiring them to close the factory. The claim that the Defendant's official ordered closure of factory is wanting. As per the plaint and written statement of defence, the Defendant is just a private company which in any way cannot order any other private company to close business. It is not the proper authority dealing with quality control or business permit for it to have powers to order closure of any

business. Thus, the claim for damage arising out of closure of business cannot be attributed to the Defendant. In view of the above discussion the rest of the issues also fail.

The law under sections 110 and 111 of Evidence Act, Cap 6 R.E. 2019 presses burden of proof to whoever alleges and the standard is on balance of probabilities. See the Court of Appeal decision in the case of **Anthony M. Masanga Vs Penina (Mama Ngesi) and Another,** Civil Appeal No. 118 of 2014 (unreported) which cited with approval the case of **Re B [2008] UKHL 35,** where Lord Hoffman in defining the term balance of probabilities states that: -

> *"If a legal rule requires a fact to be proved (a fact in issue), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates in a binary system in which the only values are O and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof falls to 'l discharge it a value of 0 is returned and the fact is treated as not ' o having happened if he does discharge it; a value of 1 is returned to and the fact is treated as having happened."*

The Plaintiffs herein were unable to discharge that burden in proving their claim thus, the relief sought cannot be granted. The suit is therefore dismissed with costs.

DATED at **ARUSHA** this 04th September 2023

D.C. KAMUZORA

JUDGE