IN THE UNITED REPUBLIC OF TANZANIA

IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL CASE NO. 204 OF 2019

NORBERT MBOWE T/A GASOIL CONSULTING GROUP ----------PLAINTIFF

VERSUS

ISSACK MWAMASIKA ---------- 1ST DEFENDANT

EDBP & GD CONSTRUCTION LIMITED ---------- 2ND DEFENDANT

HAROLD ISSACK MWAMASIKA ---------- 3RD DEFENDANT

JUDGEMENT

Date of last order: 13.06.2023
Date of Judgement: 18.08.2023

EBRAHIM, J.:

The Plaintiff in this case namely Norbert Mbowe has sued the Defendants claiming against them jointly and severally for payment of Tanzania Shillings Five Hundred Million (TZS 500,000,000/-) plus United States Dollars One Million (USD 1,000,000/-) for loss of business

and special damages for malicious prosecution in respect of Criminal Case No. 254 of 2016 at Kinondoni District Court. The Plaintiff is also claiming for general damages amounting to TZS 300,000,000/- for loss of reputation and TZS 100,000,000/- as punitive damages.

The genesis of the matter lies on the Plaintiff's allegation against the Defendants on maliciously prosecution. Reading from the plaint presented in court the Plaintiff claims that their legal wrangling with the Defendants arises from their relationship as landlord and tenant where the Plaintiff and the 2nd Defendant on February 2014 executed a lease agreement on Plot No. 100, Apartment D-26 located at Uganda Avenue, Oysterbay Area, Kinondoni Municipality at Dar Es Salaam. The 1st Defendant is the Managing Director of the 2nd Defendant. He averred that according to their lease agreement, the charged rent was USD 2000/- which later was increased to USD 2,150/-. During his stay the Plaintiff claimed that he reminded the 1st and the 2nd Defendant on the renovation and maintenance needed to be done on the premises however the dispute arose where the Plaintiff found himself locked out of the rented premises. He reported

the matter to the police and local authority and on 3rd November 2015 he issued notice to the 1st Defendant informing him that he is vacating the premises. Further, while the police and local authority were working on settling the matter, the 1st and 3rd Defendants rushed to the police station and reported that the Plaintiff has committed the offence of armed robbery where he found himself detained in custody for 5 months before being acquitted on 18th November 2016 by Kinondoni District Court on Criminal Case No. 254 of 2016. Hence the instant case as the Plaintiff believes that the 1st and the 2nd Defendant instigated the criminal charges actuated by malice and without reasonable cause following a rent dispute.

Upon being served with the plaint, the defendants in their written statement of defence vehemently resisted the plaintiff's claims contending that the Plaintiff fell in arrears of rent and the defendants' act of locking out the Plaintiff was done within the terms and conditions of their tenancy agreement. They qualified that according to their agreement once the tenant does not comply with his obligation to pay rent, the Landlord is entitled to lock the

premises and take possession. It was the defendants' further contention that the report to the police was bonafide, reasonable, without malice and there existed probable cause to do so like any other citizen would do when faced with criminal incidents like the event of theft at the 1st defendant's premises.

In addition, the 2nd Defendant filed a counter claim against the Plaintiff praying for judgment and decree as follows: - Payment of USD 6,000 being outstanding rent arrears from the date the 2nd Defendant took vacant possession of the demised premises ; Payment of USD 10,400 being security charges from 2/11/2015 to the date of filing the counter claim i.e., 2nd March 2020 at the rate of USD 200/- per month; payment of USD 200 per month from the date of filing the suit in court to the date of judgment; Payment of USD 200 per month from the date of judgment until the date the Plaintiff collects his personal effect from the 2nd defendant; interest; and costs of the suit to be met by the plaintiff in the main suit.

When parties appeared before me, the Plaintiff was represented by Mr. John Kamugisha learned Advocate whilst the Defendants had

the services of Mr. Ngudungi learned Advocate.

Upon finalization of the hearing of the case, at the prayer made by the parties' Counsel, the court on 13.06.2023 ordered parties to file their final submissions on or before 20.06.2023. The submissions were accordingly filed as scheduled. However, I shall not recapitulate them as they are in the record but shall refer to them in the course of addressing substantive issues.

On 03.06.2021, this court framed issues as proposed and agreed by the parties for determination as follows:

1. *Whether the plaintiff was prosecuted by the defendant(s);*
2. *If the issue in 1 above is in the affirmative, whether the prosecution was malicious;*
3. *Whether the prosecution occasional any loss to the plaintiff's business and injury to his reputation;*
4. *Whether at the time the plaintiff (defendant in the counter claim) was detained there was any lease agreement between him and the defendant (plaintiff to the counter claim);*
5. *If the answer in No. 4 above is in the affirmative whether there was any breach of the lease agreement by the defendant to the counter claim.*
6. *To what reliefs are the parties entitled to.*

In a bid to prove his case, the plaintiff adduced his own evidence; whilst the defendants called two witnesses.

In determining this case, I shall be guided by the salutary principle in proving a civil case that "he who alleges must prove" as per the provisions of **Section 110 (1) and (2) of the Evidence Act, Cap 6 R.E 2022** in line with the guiding principles pertaining to the tort of malicious prosecution.

The law again, i.e., **Section 112 of Cap 6 R.E 2022** goes further to provide that the onus of proof of any particular fact lies on a party who wishes the court to believe the existence of the said fact.

Both counsels have equally appreciated the above principles in their submissions.

The above provisions of the law have been well expounded by the Court of Appeal in the case of **Barelia Karangirangi vs Asteria Nyalambwa (Civil Appeal No. 237 of 2015) [2019] TZCA 51 (1 April 2019)** which was cited with authority by the counsel for Defendants in the main case which held that:

"At this juncture, we think it is pertinent to state the

principle governing proof of case in civil suits. The general rule is that he who alleges must prove. The rule finds a backing from sections 110 and 111 of the Law of Evidence Act, Cap 6 R.E. 2002 which among other things state:

"110. Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove that those facts exist. 111. The burden of proof in a suit lies on that person who would fail if no evidence at all were given on either side"

In another case of **Paulina Samson Ndawanya Vs Theresia Thomas Madaha,** Civil Appeal No. 45 of 2015 the Court of Appeal stated that:

"it is equally elementary that since the dispute was a civil case, the standard of proof was on balance of probabilities which simply mean the court will sustain such evidence which is more credible than the other on a particular fact to be proved".

Again, it is a cardinal principle of the law in a civil case that until the Plaintiff who substantively asserts the affirmative of the issue has

discharged his burden, the other party cannot be called to prove his case. This is in line with the provisions of **section 111 of the Evidence Act, Cap 6 RE 2022** that *"The burden of proof in a suit lies on that person who would fail if no evidence at all were given on either side".*

The above position was amplified in the above cited case of **Paulina Samson Ndawavya vs Theresia Thomas Madaha(supra)** in which the Court quoted with authority comments from **Sarkar's Laws of Evidence, 18th Edition M.C. Sarkar, S.C. Sarkar** and **P. C. Sarkar,** published by Lexis Nexis that:

> *"...**the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof.** It is ancient rule founded on consideration of good sense and should not be departed from without strong reason.... Until such burden discharged the other party is not required to be called to prove his case. **The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party...."*** [emphasis added]

It follows that this court has a duty to see that both, the Plaintiff in the main suit and the Plaintiffs in the Counter Claim fulfil such

requirements unless the asserted fact is admitted by the adverse party.

The first issue is *whether the Plaintiff was prosecuted by the Defendant(s).*

The law on tort of malicious prosecution though is derived from common law is now settled in Tanzania. For the Plaintiff to establish a case of malicious prosecution, he must cumulatively prove the presence of four elements as laid down by Samatta J, (as he then was) in the case of **Hosia Lalata Versus Mwasote** (1980) TLR 154. Those elements are;

1. *That he was prosecuted by the defendant.*
2. *That the prosecution ended in his favour.*
3. *That the prosecution was conducted without reasonable and probable cause.*
4. *That in bringing the prosecution the defendant was actuated by malice.*

The Court of Appeal propounded the above elements in the case of **Wilbard Lemunge vs Father Komu & Another** (Civil Appeal No. 8 of 2016) [2018] TZCA 195 (9 October 2018) which cited with approval

the case of **Paul Valentine Mtui & Another vs Bonite Bottlers Limited** (Civil Appeal No. 109 of 2014) [2015] TZCA 285 (27 February 2015) where its previous decision of **Yonnah Ngassa vs Makoye Ngassa** [2006] TLR. 2006 was referred stating that;

> *"For the claim of damages arising from malicious prosecution to stand, there must exist cumulatively five elements namely, **one**, that the plaintiff must have been prosecuted; **two**, the prosecution must have ended in the favour of the plaintiff; **three**, the defendant must have instituted the proceedings against the plaintiff without reasonable and probable cause; **four**, the defendant must have instituted the proceedings against the plaintiff maliciously; and **five**; the plaintiff must have suffered damages as a result of the prosecution."*

Auspiciously, both parties have discussed the above elements in their submissions.

In order to understand what amounts to prosecution by the defendant, the observation by hon. Chipeta, J (as he then was) sheds light as he explained the concept clearly in the case of **Jeremiah Kamama Vs Bugomola Mayandi** [1983] TLR 123 where he said that:

"The first question that arises, therefore, is when one is said to be a "prosecutor" for the purpose of a suit for damages for malicious prosecution? ***In my opinion, a person becomes a prosecutor in his regard when he takes steps with the view to setting in motion legal processes for the eventual prosecution of a person whom he alleges has committed a crime****. For instance, if A tells the police that B has stolen A's shirt and as a result that B is arrested and charged with the offence of theft, A will be said to have set in motion B's prosecution. A, therefore, will be said to be a prosecutor in a suit for damages for malicious prosecution".*

I associate myself fully with the above observation.

Applying the said position to our instant case, PW1 testified that he was arrested on 4th Feb 2016 and sent to Oysterbay police station on the allegation of burglary which was later substituted to the offence of armed robbery. He remained in custody until he was acquitted on 7th June 2016. PW said it was Harold Issack Mwamasika (The 3rd Defendant) who initially reported the alleged break-in to the police. That fact was admitted by DW1, Mr. Issack Mwamasika and DW2.

It follows therefore that, the 3rd Defendant cannot be distanced with setting a motion to the prosecution of the Plaintiff and the matter ended in favour of the Plaintiff as he was acquitted from the charged offence. Thus, the existence of the first and second elements in tort of malicious prosecution. The first issue is therefore answered in affirmative.

The pertinent question which would ultimately answer the second issue to this case is *whether the prosecution was malicious?*

As to whether the 3rd defendant instigated prosecution of the case actuated by malice and without reasonable and probable cause; evidence on record would reveal the same.

PW1 testified before the court that the 3rd Defendant (son of the 1st Defendant) filed a complaint claiming that their house was broken into and he saw the Plaintiff breaking into their house and held the 3rd defendant at gun point and took his phone. The evidence of PW1 was supported by the evidence of DW1 and DW2. DW1 testified that he was told by his son (3rd Defendant) that he saw someone like Norbert Mbowe (Plaintiff) and he could not look at him properly

because he was holding a gun. Further to that DW2 testified before the court that the incident was reported to the police by Harold Mwamasika (3rd Defendant).

Counsel for the Plaintiff relied heavily on exhibit PE4 in proving that the Plaintiff was acquitted on the alleged offence hence there was no probable cause. He cited a persuasive case of **Edward Celestine and Others Vs Deogratias Paulo**, [1982] TLR 357 at page 351 where it was held that:

> *"...The law as it stands today, thanks to the Judicial System Review Commission, is that a final judgement in a criminal proceeding is relevant where it declares any person to be guilty of a criminal offence and in that respect it is conclusive evidence that the person so convicted was guilty of that offence.* ***But where there is an acquittal, as the case herein, the judgement in a criminal proceeding is not, in a civil suit, evidence of innocence.*** *That is a question which the civil court has to determine independently. Such a judgement in an action for malicious prosecution may be evidence only for resolving the question, if it arises, whether the plaintiff was prosecuted by the defendant and whether the prosecution terminated in his favour.* ***These are factors for founding a cause for action, but the acquittal as such is treated as a mere opinion".*** [emphasis added].

I fully subscribe to the above position of this court which conspicuously makes a distinction between an acquittal in a criminal case and proof of the same in a civil case. It is obvious that the standard of proof in a criminal is beyond reasonable doubt whilst in a civil case is on the balance of probability.

I am further persuaded by further illustration made by this court in respect of the above observation in the case of **Kondo V Mwajabu Juma** [1972] HCD no. 236 where Mnzavas, J (as he then was) held that:

> "...***the fact that the appellant was acquitted on the charge of assault does not necessarily mean that he did not assault the respondent.*** *He may have done so but* ***there may have been no sufficient evidence to prove beyond reasonable doubt*** *that he did it, hence the acquittal. The appellant cannot, therefore rely on the acquittal as a basis of his argument in this civil case because* ***the burden of proof in criminal case is totally different from that in a civil case. Evidence that may fail to support a criminal charge may be quite adequate to prove a civil action"***. [emphasis is mine].

The question now comes as to whether the acquittal of the Plaintiff at the District Court is a solid proof that the 3rd Defendant had no

probable cause to report the matter to the police hence actuated by malice.

Counsel for the Plaintiff referred to the averments of the Plaintiff in his Plaint stating that the Defendants reported the matter to Oysterbay police station which ended in a criminal case for offence that never happened which caused the Plaintiff to be detained for more than five months. He cited the Court of Appeal case of **Sunflag (T) Ltd Vs Wambura and Four Others**, Civil Appeal No. 39 of 2005 (unreported) cited with approval in the case of **Masoud Issa Sungura & 10 Others Vs Security Group (T) Ltd and Another,** Civil Appeal No. 176 of 2018 which held that: "*...though not always, where there is no reasonable and probable cause, there will be malice.*"

Relying on the above cited case, counsel for the Plaintiff submitted that the defendants had onus to plead and prove affirmatively the existence of reasonable cause. He argued that there was no such proof because the 3rd defendant and one Selemani did not appear to adduce evidence. He associated the malice of the defendants

with the legal squabble between the Plaintiff and the 1st defendant on the issue of rent arrears.

DW1 testified before this court that after being called by his son (the 3rd Defendant) about the burglary he went to Dar Es Salaam to see what happened as the apartment that was broken into was his. Upon arrival he observed that there was an attempt to break his safe using gas. He further discovered that his I-phone has been stolen with other phones and 3 watches – RADO. He testified further that his son told him that he saw someone like the Plaintiff but could not look at him properly because he was held at gun point. Hence, the reporting of the incident to the police.

Again, **DW2 F.3346, Detective Sargent Ulimwengu** as one of the investigators of the incident confirmed to have investigated the matter with Detective Corporal Kombo Detective Corporal Joseph and Detective Sargent Adam. He said their investigation led to the recovering of DW1's phones and he interviewed one Selemani who had sold those phones at Kariakoo as his share that he was given by the Plaintiff. He said, Selemani said his part was to make the

environment conducive for the Plaintiff to break in. DW2 testified that the incident occurred.

At this juncture, I am inspired by the position of this court in the cited case of **Jeremiah Kamama V Bugomola Mayandi (supra)** which has also been relied upon by the Counsel for the defendants in his submission which quoted with approval the case of **Hicks V Faulker** (1881) s Q.B 167 which stated as follows:

> *"I should define reasonable cause to be, an honest belief in the guilt of the accused based upon full conviction,* ***founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true,*** *would reasonably lead any reasonable and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed".* [emphasis added].

Counsel for the defendant further referred to the case of **Mwillim Vs Kissute** (1983) TLR 358 at page 360 where it was held by this court that:

"when it comes to the knowledge of anyone that a crime has been committed a duty is laid on that person, as a citizen of the country, to state to the authorities what he knows respecting the commission of the crime, ***and if he states only what he knows and honestly believes, he cannot be subject to an action of damages merely because it turns out that the person as to whom he***

has given information is, after all, not guilty of the crime". [emphasis is mine].

From the above, the question is whether the defendants proved the existence of reasonable cause by reporting the matter to the police.

As intimated earlier DW1 confirmed to have seen the break in into his apartment and that there was an attempt to break his safe by gas. He said his phones and watches were stolen. DW2 corroborated DW1 testimony by confirming that he was among the detectives who investigated the incident and he interviewed and recorded the cautioned statement of one Selemani Saidi who was working at the 1st Defendants apartments and was also the 1st accused in a Criminal Case at Kinondoni District Court.

The presence of the burglary incident which later was substituted to the offence of armed robbery went on trial at the District Court of Kinondoni at Kinondoni prosecuted by the Republic vide Criminal Case No. 254 of 2016 **(exhibit PE4)** Eight prosecution witnesses were called including the 1st and 3rd defendants. DW2 tendered the cautioned statement of Selemani Saidi but the same could not be admitted for contravening the law. Prosecution also called F.1044

D/CPL Joseph who testified to have recorded the cautioned of the Plaintiff. Prosecution further called Ombeni Jongo who purchased a stolen phone belonging to DW1 from Amiri Nondo.

Plaintiff depended mainly on exhibit PE4 in showing that he was acquitted of the charged offence. Nevertheless, in going through the said exhibit PE4, the trial court found the accused persons i.e., the Plaintiff and Selemani Said with a case to answer. Meaning that prosecution had established a prima facie case against the Plaintiff and Selemani from the evidence of prosecution case to require them to enter their defence. It was until after the evaluation of evidence from both sides, the trial court found that prosecution did not prove their case beyond reasonable doubt.

On those basis, this court finds that it is not true that there was a fictitious incident as alleged by the Plaintiff. Exhibit PE4 proved the existence of the incident which led the 3rd Defendant to report the matter to the police and that the Plaintiff was mentioned by Selemani Hamisi and he became a suspect. The poorly investigated or prosecuted case does not mean that the reported incident did

not occur or it was fictitious.

I therefore hasten to agree with the counsel for the Defendants that the 3rd defendant had reasonable cause to report the burglary incident to the police irrespective of the fact that the Plaintiff was eventually acquitted of the alleged offence as per the holdings of the cited cases of **Jeremiah Kamama V Bugomola Mayandi (supra)** and the case of **Mwillim Vs Kissute(supra).**

Counsel for the Plaintiff referred to the issue of rent dispute between the Plaintiff and the Defendants to infer ill will or ill-spite. Conversely, DW1 told the court that he has a lot of tenants whom some owes him rent but he has not taken them to court on criminal charges.

Counsel for the Plaintiff has insisted that the defendants ought to have proven that aspect. To the contrary, this court is of the position that since there is overwhelming evidence on the occurrence of incident of house –break and or theft, much as Plaintiff had issues with the defendants, the same could not have been a reason to report a criminal matter to the police and there is no proof to suggest such assertion from the Plaintiff.

Counsel for the Plaintiff had insisted that the 3rd defendant ought to have come to prove the fact that he had reasonable cause to report the matter to the police. The same with Selemani Said Seifu.

While I agree that the 3rd Defendant would have corroborated the Defendants' case further and the same with Selemani Said but I find that their absence does not raise an alarm to this court to draw an adverse inference because there is enough evidence to show that indeed the incident of burglary occurred. As per the principle stated earlier, the proof in criminal case is not the same as in a civil case and the fact that one was acquitted in a criminal case does not necessarily mean that the incident did not occur.

From the above therefore, I answer the second issue in negative that the prosecution by the defendant against the Plaintiff was not malicious because there was reasonable cause. The same findings respond negatively to the 3rd and 4th element of proving a tort of malicious prosecution because the defendant did not instigate the proceedings against the Plaintiff without reasonable and probable cause; nor did he do it maliciously.

The third issue is whether prosecution occasioned any loss to the Plaintiff's business and his reputation.

The Plaintiff testified that he is trading as GASOIL Consulting Group and that he is doing consultation in the area of natural gas and that he has many clients including the Government of the United Republic of Tanzania. He complained therefore that his reputation was injured to the extent that he lost business. He thus prayed to be paid USD 9000 per month for loss of income, USD 2,000,000/- being value of the various business and commercial agreements lost and terminated, mental and psychological torture, Tshs 800,000,000/- being total loss of income he was supposed to earn from his business transactions and USD 5000/- being loss of properties and belongings locked up by the 1st defendant and Tshs 30,000,000/- as legal costs.

Before I began to address the issues framed for the determination by this court, I said that I shall be guided by the principle of the law of evidence that in civil cases the burden of proof lies on the party who wishes the matter to be decided in his favour.

To begin with the above claimed amounts falls within the claim of special damages which as the law requires must be specifically pleaded and strictly proved – see the case of **Simac Limited Vs TPB Bank Plc**, Civil Appeal No. 171 of 2018 as cited by the Counsel for the Defendant; also the case **Zuberi Augustino V. Anicet Mugabe**, [1992] TLR 137.

First of all, the Plaintiff apart from his empty words that he is trading as GASOIL consulting group, he has not managed to tender even an identity card, certificate of incorporation, MEMART, TIN number or any other document to prove that he is indeed working on such genre leave alone books of accounts or TRA receipts. In short he has not proven to a court if he has any viable income.

It follows that the Plaintiff does not have any business or viable income, or any client or any lost commercial agreements to justify the amount claimed in his plaint. In the circumstances therefore, I find no loss occasioned to the Plaintiff on either his business or reputation as there is neither such business proved to the court not the alleged clients. Further, as found out above, there is no proof of

malicious prosecution to entitle the PW1 to be granted punitive damages or general damages as claimed. The 3rd issue is equally answered in the negative.

Coming to the fourth and fifth issues as to whether there was any lease agreement between the Plaintiff and the defendant; and whether there was a breach of the lease agreement; the same would have to be looked at the evidence on record in respect of the counter claim of the Defendants (Plaintiffs in the counter claim).

Indisputably, as pleaded by the Plaintiff in para 7 of his plaint that in February 2014 he executed a lease agreement with the second defendant while the 1st defendant was a director for a rent of USD 2,000/- (exhibit PE2 – Lease Agreement) of Apartment D-26 located at Uganda Avenue, Oysterbay Area, Kinondoni Municipality, Dar Es Salaam and service charge of USD 150/- per month. He averred at para 9 of the plaint that sometimes on or about July, August and September 2015, he reminded the 1st and 2nd defendant to do maintenance at the demised premises to no avail. Instead, the 1st defendant locked out the Plaintiff and prohibited him from entering

the premises and his belongings are still inside the place. The Plaintiff informed the 1st defendant of his decision to vacate the premises on 03.11.2015 **(exhibit PE3)**.

Testifying in chief as PW1, the Plaintiff told the court that they executed a lease agreement on 27.02.2014 and according to exhibit PE2, rent was supposed to be paid three months in advance. He said he paid rent up to 30th June 2015. Sometimes in June 2015 he travelled to South Africa where he overstayed until July 2015 and he admitted to have not paid the three months' rent due starting from the month of July 2015. He was locked out where eventually he paid rent for two months i.e., July and August with a promise to effect the payment of three months when the business goes well. He said in between he also paid rent for September 2015 and in September he paid one month rent for October 2015. He testified further that on 30th October 2015 he received invoice for payment of rent for the month of November 2015, December 2015 and January 2016. However, before effecting the three month's period rent, on 02.11.2015 he was locked out for failure to make prompt payment

irrespective of **clause 4(i) and (iii) of the tenancy agreement (exhibit PE2).** The referred clause is to the effect that in case of either party wishing to terminate the agreement, that party should issue one month's notice to the other party and the landlord has the right to re-enter the apartment upon delay in repayment of rent for ten (10) days.

In essence the Plaintiff is saying in his evidence in chief that he paid rent up to October 2015 before he was locked out and he has been paying after the raising of an invoice through NBC. However, since he wants the court to believe that he was not in rent arrears, he had a legal burden to prove such assertion that indeed he had paid rent up to October 2015.

Responding to cross examination question, the Plaintiff admitted that on aspect of rent arrears raised in the counter claim, he has not brought any documentary proof in his case to show that he paid the arrears of USD 6,000/- and there was no remittance attached with his plaint. If at all, he admitted that the he owes the defendant storages charges for his own stuffs pending payment of rent. He admitted

further that he did not pay rent of USD 6,000/- because it was the landlord who breached contract. The response by the Plaintiff is an admission and acknowledgement of rent arrears of USD 6,000/-. He also admitted in re-examination that he received the invoice on 30.10.2015 for payment of rent for Nov, Dec and January but he did not tender such invoice of 30.10.2015 as proof.

On the hand, the defendants in their Written Statement of Defence denied the contents of para 9 of the Plaintiff's plaint and contended that the plaintiff fell in arrears of rent payment hence the locking out. While denying to have breached the tenancy agreement, the defendant averred further that the locking out of the plaintiff was done in accordance to the terms and conditions of their tenancy agreement.

Further to that, the Defendants in the main suit raised a counter claim of USD 10,400/- being storage and security charges from 02.11.2015 to the date of filing the claim in court i.e., 2nd March 2020 at the rate of USD 200/- per month; and the same rate to apply from the date of filing the suit until the date the Plaintiff shall collect his

personal effect. The defendants further claimed for USD 6000/- being rent arrears fell by the Plaintiff as of the date the defendant took vacant possession of the demised premises.

Testifying before the court. DW1 said that the Plaintiff failed to pay rent for the month of August, September and October 2015 hence the lock out on 02.11.2015. He submitted further that the Plaintiffs stuff are in their storage until they can recover their money and they are charging him storage charge of USD 200/- per month. He tendered **exhibit DE1** being a list of Plaintiff's stuff found in apartment No. 26, Oysterbay – Uganda Avenue, Plot 100.

Responding to cross examination question he said the Plaintiff was in rent arrears for the month of August, September and October 2015 that was why he locked him out in November 2015.

Now coming to issue no 4 as *to whether at the time the Plaintiff (Defendant in the Counter Claim) was detained there was any lease agreement between him and the Defendant (Plaintiff to the Counter Claim);* the same can be well answered from the disputed facts as per the evidence of both parties.

Both parties have testified that the lock out was done on 02.11.2015 where the Plaintiff equally issued a 30 days' notice to vacate the premises with immediate effect. Again as correctly observed by the counsel for the Plaintiff, in view of testimonies from both parties, it is apparent that the Plaintiff was detained on 07.06.2016. In view of the above, it is obvious that the tenancy agreement in respect of the demised premises ended on 02.11.2015.

That being said, the fourth issue is answered in the negative that there was no any lease agreement between the Plaintiff (Defendant in the Counter Claim) and the Defendant (Plaintiff in the Counter Claim) at the time of detention of the Plaintiff in the main suit.

The **5th issue** is *if the answer in No. 4 above is in the affirmative whether there was any breach of the lease agreement by the defendant to the counter claim.*

Counsel for the Plaintiff has argued in his submission that since the 4th issue is in negative then there is no any breach of the lease agreement by the defendant to the counter claim. He however took cognisance of the claim by the Plaintiff to the counter claim that the

defendant to the claim was in rent arrears for three months which he said that it was neither disclosed nor pleaded anywhere in the counter claim which months were in arrears. He cited the provisions of **Order VI Rule 3 of the Civil Procedure Code, Cap 33 RE 2019**.

To the contrary counsel for the Plaintiff to the counter claim submitted that Exhibit PE2 is a lease agreement which specify the condition that rent was payable in advance (clause 1 and 4.1) and that a landlord can re-enter the premises in the event the rent remain unpaid for a period of 10 days or more. He said since the Plaintiff claimed to have paid rent for the months of August, September and October, he had legal obligation to prove the payment and not otherwise. I share his views.

As alluded earlier, the Defendant to the counter claim said in his examination in chief that he was not in rent arrears as he paid the same through NBC Bank for the Month of August, September and October hence the lock out was a breach of tenancy agreement. However, since he claims that the whole issue that led to his arrest began on the issue of rent arrears and that he was not on rent

arrears, he ought to have proved such assertion for the court to see that the Plaintiff to the counter claim was in breach of their tenancy agreement for having locked out the Defendant to the counter claim.

Plaintiff admitted on aspect of rent arrears raised in the counter claim that he has not brought any documentary proof in his case to show that he paid the arrears of USD 6,000/- and there was no remittance attached with his plaint. If at all, PW1 admitted that the he owes the defendant storages charges for his own stuffs pending payment of rent. He admitted further that he did not pay rent of USD 6,000/- because it was the landlord who breached contract.

It is therefore clear that much as the Plaintiff to the counter claim only mentioned that Defendant to the counter claim was in rent arrears for three months hence the lock out in 02.11.2015; and the Defendant to the claim failed to prove his alleged that he had paid rent for the months of August, September and October 2015, this court in terms of **section 13 (b) of the Evidence Act, Cap 6 RE 2022** draw inference of the fact that the months that the Defendant to

the counter claim failed to prove that he paid rent are August, September and October 2015 which totalled to the claimed amount by the Plaintiff to the Counter claim of USD 6,000/-.

That being said, **the 5th issue is answered** in the affirmative that there was a breach of the lease agreement by the Defendant to the counter claim.

*The **6th issue** is on the reliefs parties are entitled to.*

Basing on the evidence on record and as per the findings I have made above, I find that the Plaintiff in the main case has failed to prove his case on malicious prosecution against the Defendants. As a result, I dismiss the Plaintiff's suit in its entirety with costs.

Conversely, coming to the counter claim, I find that the Defendant to the counter claim breached the terms of the tenancy agreement and I accordingly enter judgement for the Plaintiffs to the counter claim and proceed to grant the Plaintiffs to the Counter Claim the following reliefs:

i. Payment of USD 6000.00 (say United States Dollars Six Thousands Only) being rent arrears by the defendant to the counter claim for the months of August, September and October 2015;

ii. Payment of USD 10,400/- being storage charges of the defendant's to the counter claim stuffs at the rate of USD 200/- per month being 10% of the payable rent stored at the Plaintiffs' to the counter claim facilities from 02.11.2015 to 2nd March 2020;

iii. Payment of interest at 12% per annum on the principal sum above from the date of filing counter claim to the date of judgement.

iv. Payment of interest at 7% per annum on the decretal sum above from the date of judgement until full payment

v. Costs of the counter claim shall be met by the Plaintiff in the main suit

Accordingly ordered.

R.A.Ebrahim

JUDGE

Dar Es Salaam

18.08.2023