

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MANYARA
AT BABATI**

CIVIL APPEAL NO. 10 OF 2023

(Originating from Civil Case No. 03 of 2022 before the District Court of Babati)

HAMIDU ZUBERI.....APPELLANT

VERSUS

ASHA GWAAY.....1ST RESPONDENT

YUSUPH HAMIS.....2ND RESPONDENT

SAID HAMIS HUSSEIN.....3RD RESPONDENT

JUDGMENT

21st February & 6th May, 2024

Kahyoza, J.:

Asha Gwaay, Yusuph Hamis and Said Hamis Hussein sued **Hamidu Zuberi** before the district court claiming for payment of-

- 1) Tzs. 40,000,000/= as general damages for malicious prosecution;
- 2) interest on the decretal sum;
- 3) compensation or loss of profit form business and agricultural gain;
- 4) damages for mental and psychological torture;
- 5) costs and any other relief(s) the Court may deem fit to award.

Hamidu Zuberi defaulted to file the written statement of defence within 21 days. The trial court granted him a seven days leave to file the written statement of defence. **Hamidu Zuberi** filed the written statement of defence. Following the respondent's advocate's objection that **Hamidu Zuberi** filed his written statement of defence out of prescribed time, the trial court sustained the preliminary objection. It dismissed **Hamidu Zuberi's** written statement of defence for being filed out of time without leave. I wish to add that the trial Court ought to have struck out the written statement of defence filed out of time from the record and not dismissed it. The striking out of the written statement of defence (the WSD) would have to put **Hamidu Zuberi** to a position that he filed no defence.

Hamidu Zuberi made an attempt to set aside the order to proceed *ex-parte*, unfortunately the record does depict what happened. The record reads that on 21.2.2023 when the matter came before the trial court for mention so as to determine the way forward, Mr. Masanja advised that the issue whether to determine an application seeking to set aside an order to proceed *ex-parte* be raised before the hearing. The court framed the issues to be proved during the *ex-parte* hearing and fixed hearing on 7.8.2023. On the date fixed for hearing, the issue of hearing an application seeking to set

aside the order to proceed *ex-parte* was not raised. The trial court proceeded to hear the matter *ex- parte*. The trial court did not consider the application to set aside the order to proceed *ex parte*. I leave that at that and revert to the issues of the instant appeal.

Having heard the suit *ex-parte*, the trial court found that the respondents proved the claim of malicious prosecution and awarded damages of Tzs. 5,000,000/=, interest on the decretal sum from the judgment date to the date of full payment and costs.

Dissatisfied, **Hamidu Zuberi** appealed to this Court contending that the trial court's act of sticking out his defence and refusing to set aside the *ex-parte* order denied him the right to be heard and that the respondent failed to establish that he initiated criminal proceedings with malice.

Hamidu, the appellant appeared unrepresented and submitted that the respondents never won a criminal case against him. He added that he was unable to file the WSD on time as his advocate could not secure a control number on time to pay filing fees.

Mr. Masanja, the respondents' advocate replied that the appellant had failed to prosecute the appeal. He added that the appellant was required to follow the procedure of setting aside the *ex-parte* decree before lodging an

appeal. The law is settled that when there is an *ex-parte* decree, the party aggrieved has first to exhaust the available remedy. To support his contention, he cited the case of **M/S Equity For Tanzania (EFTA) LTD v. Ramdhani Mohamed Mungwe**, Civil Rev. 3/2022.

He concluded that by lodging the current appeal **Hamidu Zuberi** is trying to impeach the court record. He cannot impeach the record. The court record speaks for itself. He prayed the appeal to be dismissed with costs.

Hamidu Zuberi had nothing to re-join.

Having heard the submissions, I decided to commence with the issue whether it is procedurally correct to appeal against an *ex parte* decree without first applying to set aside the *ex parte* decree. Depending on the outcome of the first issue, I will determine the issue whether the respondents proved the claim of malicious damage against the appellant.

Is an *ex parte* decree appealable?

The respondents' advocate Mr. Masanja took a position that it unprocurable for a party aggrieved by an *ex parte* decree to appeal. He cited the decision of this Court in **M/S Equity For Tanzania (EFTA) LTD v. Ramdhani Mohamed Mungwe**, Civil Rev. 3/2022. I beg to differ with my learned friend's submission. I am of the view that a party aggrieved by an *ex parte* decree has two options take; **one**, he may apply to the court which

passed the decree to set aside the *ex parte* decree. If, the court dismisses his application he may appeal against the dismissal order. See the provisions of Order VIII rule 14(2) or rule 15 of the Civil Procedure Code [Cap. 33 R.E. 2019] (the **CPC**).

Two, a party aggrieved by an *ex parte* decree, may appeal, if he is of opinion that the *ex parte* decree was reached erroneous or without evidence. See section 70 of the CPC. It states that-

70. Appeal from original decree

*(1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, **an appeal shall lie to the High Court from every decree passed by a court of a resident magistrate or a district court exercising original jurisdiction.***

*(2) An appeal may **lie from an original decree passed ex parte.***

(3) No appeal shall lie from a decree passed by the court with the consent of the parties. (Emphasis added).

The sub-section (2) of section 70 of the CPC is clear, an appeal lies against an *ex- parte* decree. There is no condition imposed before a person can appeal against the *ex parte* decree. A party who appeals against the *ex parte* decree seeks to challenge the decree because either the decree holder did not prove his case on the balance of probabilities, despite proceeding *ex*

parte or the reliefs awarded were excessive or not justified by law. An appeal against an *ex parte* decree stems from an established principle of evidence, that a plaintiff has a duty to prove his claim to the required standard in an *ex-parte* hearing. See **Standard Chartered Bank Tanzania Ltd v. Samwel Nyalla Nghuni** (Civil Appeal No. 45 of 2020) [2023] TZCA 73 (28 February 2023) where the Court of Appeal observed that-

*We also wish to add, for the benefit of the legal fraternity that, regardless of whether or not the matter proceeded ex parte, a plaintiff in a civil case is not relieved or absolved of the duty to prove the case against the defendant on the required standard. (See **Kalyango Construction and Building Contractors. Limited Vs. China Chongqing International Construction Corporation (CICO)**, Civil Appeal No. 29 of 2012 and **Mustafa Ibrahim Kassam T/A Rustam and Brothers Vs. Maro Mwita Maro**, Civil Appeal No. 76 of 2019 (both unreported). In other words, where a suit proceeds ex-parte against the defendant, the trial Judge or Magistrate does not assume the role of an umpire as to act as a conduit pipe for the plaintiff's averments to flow freely throughout and formally endorse them in the judgment. We are saying so because, it appears to us that, in the present case, the learned trial Judge endorsed the respondent's claim without.*

To the position that person aggrieved by an *ex parte* decree has a right to appeal, I have found rescue in the decision of the Court of Appeal in

Dangote Industries Limited Tanzania vs Warnercom T. Limited (Civil Appeal 13 of 2021) [2022] TZCA 34 (17 February 2022). The Court of Appeal observed that-

*"The procedure for setting aside an ex parte judgment in both the High Court and subordinate courts is set out under Order 9 rule 13 (1) of the CPC according to which **an ex-parte judgment may be set aside if the judgment debtor assigns good cause that prevented him to enter appearance on the date when the court allowed the decree holder to proceed ex-parte.** Further, under order XL rule 1 (d) of the CPC, an order refusing to set aside an ex parte judgment is appealable. **Conversely, an ex-parte judgment is appealable under section 70 (2) of the CPC which provides** that "an appeal may lie from an original decree passed ex-parte" Section 70 (2) of the CPC, unambiguous as it is, does not impose any condition for appealing against an ex-parte judgment.*

*In our considered opinion therefore, **as the provision of section 70 (2) of the CPC clearly and unambiguously provides for an automatic right of appeal against an ex-parte judgment, it is not for the court to narrow down its scope by implying that the legislature intended that such an appeal would be conditional upon there being an attempt to set the ex parte judgment aside.** We can thus, **hold without any hesitation that, the right to appeal against an ex parte decree is***

automatic and does not depend upon there being a prior proceeding to set aside the ex parte judgment.

*It was submitted for the respondent that, the requirement that an appeal against an ex parte judgment must be preceded by an application to set the same aside has been laid down in the case of **Jaffari Sanya & Another v. Saleh Sadiq Osman** (supra) which was followed in **Pangea Minerals Ltd v. Petrofuel (T) Limited and 2 Others**. We have very carefully read the authorities and with respect, we do not think that, they are in support of that proposition. We shall explain. (Emphasis added)*

I find, without hesitation that, the appellant is right to appeal against the *ex parte* decree. I will proceed to consider the appeal on merit.

Was the claim for malicious prosecution proved?

This is a first appeal, thus, one of its duty among others, is to re-evaluate the evidence. There is no doubt that the suit, **Asha Gwaay, Yusuph Hamis** and **Said Hamis Hussein** instituted is based on a tort of malicious prosecution. **Asha Gwaay, Yusuph Hamis** and **Said Hamis Hussein** claimed that **Hamidu Zuberi** maliciously prosecuted them. It is settled that a party suing for malicious prosecution must prove, as the Court of Appeal held in **Yonah Ngassa v. Makoye Ngasa** [2006] T.L.R. 123, the following-

1. *that the proceedings were instituted or continued by the defendant;*
2. *that the defendant acted without reasonable and probable cause;*
3. *that the defendant acted maliciously; and*
4. *that the proceedings terminated in the plaintiff's favour.*

It is further settled that to succeed in claim for malicious prosecution, the plaintiff must prove all four ingredients as stated in **Mbowa v. East Mingo Administration** [1972] EA 353 the defunct East Africa Court of Appeal stated that-

"The plaintiff in order to succeed, all the four essentials or requirement of malicious prosecution; as set out above, have to be fulfilled and that he has suffered damage. In other words, the four requirements must "unite" in order to create or establish a cause of action. If the plaintiff does not prove them he would fail in his action."

This court's task is to find out whether **Asha Gwaay, Yusuph Hamis** and **Said Hamis Hussein** proved all four elements of a tort of malicious prosecution, by balance of preponderance. I will commence with the issue whether **Asha Gwaay, Yusuph Hamis** and **Said Hamis Hussein** (the respondents) proved that **Hamidu Zuberi** actuated criminal proceedings

out of malice. The undisputed evidence on record is that **Hamidu Zuberi** instituted criminal proceedings against the respondents alleging that the respondents had committed the offence of theft. They stole his crops.

The evidence showed that **Hamidu Zuberi** found the respondents harvesting his crops. **Asha Gwaay**, did not object to have harvested the crops but she contended that she owned the crops. **Hamidu Zuberi** deposed during trial of the criminal case that, before the respondents harvested his crops, they had reached an amicable settlement to the effect that, the respondents will not enter onto the farm and cultivate it. I am of the view that such evidence on record did not establish that **Hamidu Zuberi** instituted criminal proceedings with malice. For that reason, I do not find it proved that **Hamidu Zuberi** was actuated by malice.

The Court of Appeal in **James Funke Ngwagilo v. Attorney General**, [2004] TLR 161, *defined malice* thus-

*"Malice in the context of malicious prosecution is an intent to use the legal process for some other than its legally appointed and appropriate purpose. The appellant could prove malice by showing for instance, **that the prosecution did not honestly believe in the case which they were making, that there was no evidence at all upon which a reasonable tribunal could convict, that the prosecution was mounted for a wrong motive and show that motive.**"* [Emphasis is added]

There is evidence that the matter had been amicably settled and the appellant had a letter from the ward tribunal to prove that he owned the suit land and crops. This evidence is in the primary court judgment in respect of the criminal case, **Hamidu Zuberi** instituted against **Asha Gwaay, Yusuph Hamis** and **Said Hamis Hussein**. Thus, one cannot argue convincingly that, **Hamidu Zuberi** instituted criminal proceedings with malice.

Malice in the claim for malicious prosecution must be proved. The respondents were duty bound to bring evidence to prove that **Hamidu Zuberi** prosecuted them maliciously. See the holding in **Bhoke Chacha v Daniel Misenya** [1983] T. L.R. 329 where the Court held that-

"It is for the appellant to prove that the respondent's report was malicious...This can be done by adducing evidence which will lead to the Court to make finding whether the respondent acted maliciously."

I am alive of the position of the law that malice may be inferred as stated in **Jeremy Clifford v The Chief Constable of the Hertfordshire Constabulary** [2011] EWHC 815 (QB). In that case, the suit involved a claimant who believed he had been maliciously prosecuted for possession of indecent images. Justice Mackay remarked that-

"... malice "can be inferred from the absence of reasonable and probable cause if the evidence warrants it". (Emphasis added)

The respondents neither prove that, the appellant instituted the claim with malice nor is there evidence on record for this Court to infer malice.

Did Zuberi initiate criminal proceedings without probable and reasonable cause?

To prove malicious prosecution, **Asha Gwaay, Yusuph Hamis** and **Said Hamis Hussein**, had also a duty to prove that **Hamidu Zuberi** initiated the case against them without probable and reasonable cause. This Court in **Amina Mpimbi v. Ramadhani Kiwe** [1990] T.L.R. (Ruhumbika, J.) held that-

*"For the appellant to have succeeded in her action against the respondent, she should have proved in the court below that there was malice on the part of the respondent in that he had prosecuted her in the primary court **without just cause or excuse or that the respondent had no reasonable cause when he prosecuted her over there.** Therefore, the defendant has to prove that defendant did not have such a belief.*

The Court of Appeal defined the term of art *reasonable and probable cause* in **Seif Mohamed Maungu v Wendum Lameck Sawe t/a W.L.**

Sawe Garage Civil Appeal No. 102/2013 (CAT unreported) by quoting the definition in **Hicks v. Faulkner** (1878) 8 QBD 161 at 171 as follows-

"Reasonable and probable cause is an honest belief in the guilt of the accused based on a full conviction founded upon reasonable grounds, of the existence of a circumstances, which assuming them to be true, would reasonably lead any ordinary prudent man and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed."

In another case of **James Funke Ngwagilo** (*supra*), Court of Appeal in held that it was enough if a person who initiated criminal proceedings to believe that *that there is reasonable and probable cause* for the prosecution.

It held-

"it is enough if the defendant believes that there is reasonable and probable cause for the prosecution" for one to prove that there was justification for the prosecution. Certainly, the burden lay with the appellant to prove the absence of reasonable and probable cause in the prosecution. We note from the record of appeal that throughout his testimony spanning from page 105 to page 110, the appellant did not address this element. The only evidence on which to base the claim for malicious prosecution was produced rather cursory at pages 107 and 108 of the record of appeal thus:"

From the above authorities, **Asha Gwaay, Yusuph Hamis** and **Said Hamis Hussein** had a duty to prove that **Hamidu Zuberi** did not **honestly believe** or **believe at all** that there was a reasonable and probable cause to prosecute them. The fact that prior to the commencement of criminal proceedings, the dispute between the parties had been settled in the appellant's favour that, the respondents had no right to cultivate the disputed land, entitled him to belief that the respondents illegally harvested his crops. They stole his crops.

I am of the firm view that, the evidence, as shown above, proves boisterously the presence of ***reasonable and probable cause***. The appellant had reason to believe that the respondents had no right to harvest the crops.

Were the criminal proceedings terminated in the respondents' favour?

To succeed in a claim for malicious prosecution, **Asha Gwaay, Yusuph Hamis** and **Said Hamis Hussein** had another task to prove on the balance of probability that, the criminal proceedings were terminated in their favour. I had a cursory review of the judgment of the primary court in criminal case number 87/2021 **Hamidu Zuberi v Asha Gwaay, Yusuph**

Hamis and Said Hamis Hussein. The primary court's record speaks louder that the proceedings were not determined in the respondents' favour. The primary court found no evidence to prove that respondents were guilty or not guilty as there was land dispute which was not settled. It established that, the land ownership dispute was not settled as **Hamidu Zuberi** had a letter from the ward tribunal to prove that he had title to the land and **Asha Gwaay, Yusuph Hamis and Said Hamis Hussein** a letter from the ward tribunal indicating that she was the owner of the land.

I wish to reproduce the relevant part-

*"Kupitia ushahidi uliotolewa mbele yangu na pande zote mbili Mahakama hii tukufu inapata ukakasi wa kutoa hukumu kwa kuwaweka washtakiwa hatiani kwa sababu zifuatazo; mshtakiwa namba moja ametoa kibali kinachoonyesha kuwa waliruhusiwa kuvuna, sasa Mahakama **Inapata utata kuwaweka hatiani washtakiwa wakati wanakibali kilichowaruhusu kuvuna, kibali walichopewa na ofisi ya Baraza la Kata na Ardhi, lakini pia Mahakama inapata kigugumizi kwa kibaii hichi kwani hata mialamikaji nae aiipewa kibaii kuwa familia yake ndio wamiliki wa eneo hilo na kibali kilichotolewa mara ya piii hakikuonyesha kama kmetengua maamuzi ya kwanza. Hivyo Mahakama hii tukufu inaona vibali vyote ni batili kwa havijafata utaratibu wa kisheria na kuamuru kesi ikafunguliwe Baraza la Ardhi la Wilaya ili kuweza kupata mmiliki wa eneo hili,***

kwani Baraza la Ardhi la Kata linachochea mgogoro kwani wamevitoa vibali kwa pande zote mbili, na ili kuepusha uvunjifu wa amani yoyote yule asifanye chochote kwenye eneo hilo mpaka BARAZA LA ARDHI LA WILAYA BABATI. Kwa maana hiyo Mahakama inaona si kosa la washtakiwa kwa sababu walipewa kibali cha kuvuna." (Emphasis added)

Based on the judgment in the criminal case before the primary court, it crystal clear that the criminal proceedings were not determined in the respondents' favour. Parties were advised to seek remedy to the district land and housing tribunal. Thus, **Asha Gwaay, Yusuph Hamis** and **Said Hamis Hussein** did not prove another element of the tort of malicious prosecution.

In the end, I find that **Asha Gwaay, Yusuph Hamis** and **Said Hamis Hussein** failed to prove three elements of the tort of malicious prosecution, which are that; **one**, Hamidu Zuberi acted without reasonable and probable cause; **two**, he was actuated by malice in prosecuting them; and **three**, the criminal proceedings ended in their favour.

I allow the appeal and hold that the trial court was not justified to decide in favour of **Asha Gwaay, Yusuph Hamis** and **Said Hamis Hussein**. **Asha Gwaay, Yusuph Hamis** and **Said Hamis Hussein** did not prove the claim of malicious prosecution against **Hamidu Zuberi**. I set aside

the judgment and decree of the trial court and proceed to dismiss the claim instituted by the respondents for want of evidence. To avoid endless litigations among the parties who are relatives, I make no orders to costs.

It is accordingly ordered.

Dated at Babati this 6th day of May, 2024.



**J. R. Kahyoza
JUDGE**

Court: Judgment delivered in the presence of the parties. B/C Ms. Fatna (RMA) present.

**J.R. Kahyoza
JUDGE
6/05/2025**