

TANZANIA / JUDGMENT

20100506 TZHC Moshi

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TZHCDECIDED
6 May 2010

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IN THE HIGH COURT OF TANZANIA, AT MOSHI (DC) CIVIL APPEAL NO.14 OF 2008 C/F CIVIL CASE NO.26 OF 2004 OF RM'S COURT OF MOSHI JOSEPH SIKUSTAHILI APPELLANT VERSUS ELIUDI PETER SWAI RESPONDENT
r' RULING MZUNA, J. This preliminary objection is in respect of an application filed by Mr. Sandi, learned counsel for the Applicant/Respondent in the main suit Eliud. Peter Swai. It is against Mr. Joseph Sikustahili, the appellant. It is against the accompanied decree which the learned counsel says is a defective decree and therefore prayed for, - the same to be dismissed. - That the decree and its date of signing it defer and that the same is incompetent and should therefore be dismissed under order XX Rule 7 of CPC Cap.33 R.E (2002). On his part the appellant/respondent in this application asked for this court to consider his appeal on merits as he is innocent to that anomaly. I have carefully considered the arguments advanced for and against this application. 1 The law as it stands is well provided under Order XX rule 7 of the C.P.C. Cap 33 R.E.2002. That provision of the law reads as follows:- "7. Date of decree. The decree shall bear the date of the day on which the judgment was pronounced, and when the Judge or Magistrate has satisfied himself that the decree has been drawn up in accordance with the judgment he shall sign the decree." (Emphasis supplied). According to the wording of the above provision of the law, the term used is "shall" which means it is mandatory. In other words a decree which bear a date different to that on which the judgment was pronounced is a defective decree. It is illegal. Even where a Magistrate has vacated office before pronouncing a judgment or signing a decree Order XX Rule 8 C.P.C. Cap.33 (R.E.2002) provide that "a decree drawn up in accordance with such judgment may be signed by his successor." According to the court record, a judgment was prepared and signed by G. Herbert, RM (as he then was) on 6/12/2007. It was delivered by M. Lusewa, RM on 10/12/2007. A decree bears both dates i.e. 6th day of December, 2007 and 10th day of December,

2007. That is in total divergence to the provisions of the law, above cited. 2. I, being the case, a remedy I think is not to allow the appellant/respondent amendment of the decree; I would have thought of so had there been an appeal worth consideration. To put it in brief, the appellant/respondent Joseph Sikustahili instituted a suit on malicious prosecution. He said a charge of arson which was preferred against him was instituted with spite or ill will following a false information filed to the police by the respondent/applicant Eliud Peter Swai. The suit was dismissed for, what the trial court Magistrate found there was no

basis for the award of damages and secondly that the ingredients of malicious prosecution were not proved to the satisfaction as well stated in the case of Jeremiah Kamama Vs. Bugomofa Mayandi [1983] T.L.R. 123. There was evidence that indeed the respondent's house was set on fire. As stated by Korosso, J. (though in obiter) in the case of Mafumba Jilawaji v. Budu Mnyagolya 1992 T.L.R. 310 that: "Prosecution is one of the essentials of the tort of malicious prosecution. No plaintiff can ever satisfy this 'essential': in a criminal case, this is because most prosecution before District and High Court are conducted by Public Prosecutors and State Attorneys" Surely, the appellant was arrested, case investigated and then charged. He, under such circumstance, could not point a finger on the respondent/applicant that there was no honest belief in the report, ... It was held in the case of Mbaraka William V. Adamu Kissute [1983] T.L.R. 358, Mushi, J. (as he then was that): "In a case of Malicious prosecution the most important consideration to be made is whether there was an honest belief in the words or report which formed the basis for the malicious prosecution." Evidence was adduced that the appellant and respondent were not in good terms. Naturally, the offence of Arson is committed during night or in a situation where the criminal is not seen. The charge against the appellant was dismissed for a simple reason that the respondent had no other independent witness to add weight to his evidence that indeed the appellant was a suspect. There is therefore no merit in the intended appeal as mere acquittal is not by itself proof that the complaint was false. The preliminary objection is accordingly sustained with costs. M.G. MZUNA, JUDGE 6/5/2010 Date: 6/5/2010 ... Coram: M.G. Mzuna, J. Appellant/Respondent: Respondent For Respondent/Applicant: Mr. Sandi, Advocate C.C: Ramla Court: Ruling delivered. 4 M.G. MZUNA, JUDGE 6/5/2010 Appellant/Respondent: I pray to be supplied with a copy of the

ruling.

Court: The same be typed and supplied to him upon payment of court fees. M.G. MZUNA, JUDGE 6/5/2010 ... f\ -G. Notified 7 free Copy: j ::~f_.JJgJ;_ AIJVOC•1"B - . 5 ----- . -----~--

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