

TANZANIA / JUDGMENT

obedi bagaile masatu and another vs cornel magembe 2021 tzhc 3510 31 may 2021

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IN THE HIGH COURT OF TANZANIA (IN THE DISTRICT REGISTRY) ATMWANZA CIVIL APPEAL NO.02OF 2020 (Arising from the Resident Magistrate Court for Mwanza in Civil Case No. 33 of 2020)

1. OBEDI BAGAILLE MASATU APPELLANTS
2. OBEDI BAGAILLE MASATU (As Administrator of the Estate of the late Masatu Kizilahabi VERSUS CORN EL MAGEMBE RESPONDENT

JUDGMENT

Date of last order: 27.05.2021 Date of Judgment: 31.05.2021 AZ.MGEYEKWA, J At the centre of controversy between the parties to this appeal is a parcel of land, Plot located at Galu village, Ukerewe District within Mwanza Region. The decision from which this appeal stems is the Ruling of the Resident Magistrate Court in Civil Case No. 33 of 2020. The material background to the dispute is not difficult to comprehend. I find it fitting to narrate them, albeit briefly, in a bid to appreciate the present appeal. They go thus: the appellants instituted a suit before the Resident Magistrate Court for Mwanza against Cornel Magembe, the respondent. The appellant claimed that he was appointed as administrator of the estate of the late Masatu Kizilahabi who during all the material time owned 60 acres of land situated at Galu Village at Ukerewe District within Mwanza Region. The appellant claimed that he and his late father were in possession of the said piece of land and jointly cultivated and kept livestock thereon. It is alleged that on 9 March, 2019 the respondent who is a District Commissioner summoned the appellant and his father demanding that they surrender possession of the land on the allegation that the same was owned by Galu Village Government. The appellant produced documents to prove that they are legal owner of the said piece of land and Village officials confirmed their ownership. It is alleged that on 11 March, 2019 the respondent visited the village and unlawfully and wrongfully directed and procured Police officers accompanying him to arrest the appellant and his late father. They were placed in custody at Nansio Police Station for one week and they were not informed about the charges which were facing them. On 18 March, 2019 Cornel Magembe maliciously ordered 2 the

Police Officers to arraign the appellant and his late father for criminal trespass. The appellant and his late father were released on bail they resumed their activities on the said piece of land but the respondent directed them to stop any activities. Again, they were rearrested on 12^o August, 2019, and placed in custody at Nansio Police Station and the respondent directed the Police Officer to release them on 19 August, 2019. The appellant alleged that on 3^o September, 2019 the respondent ordered the villagers to enter invade the disputed piece of land and take possession as a result they trespassed their piece of land. They alleged that the villagers destructed trees, water wells, and uprooted crops. The late Masatu Kizilahabi relapsed into a depression resulting in committing suicide on 9 September, 2019. The appellant claims that they were wrongly imprisoned and deprived of their liberty. Their reputation was injured and suffered considerable mental and bodily pain and suffered loss and damage. Hence, the appellant decided to institute a suit at the Resident Magistrate Court for Mwanza, claiming for general damages for false imprisonment, general damage for malicious prosecution, general damages for trespass and possession of the land, interest on the decretal 3 sum at court rate from the date of judgment until payment in full, costs of the suit and any other relief this Honourable court may deem fit to grant. The suit has hit a snag. It has been objected to by the respondent's Advocate by way of preliminary. The learned State Attorney raised objections that:-

1. The suit is bad in law for contravention of section 6 (2) of the Government Proceedings Act and
2. That the Honourable court lacks Jurisdiction to grant prayers in paragraphs (b), (c), (d), and (e). The Resident Magistrate Court determined the objections, sustained the objections, and struck out the suit. Aggrieved, the appellant filed the instant appeal before this Court seeking to assail the decision of the trial court on three grounds of appeal; namely:-
 1. That, the court erred in law to allow the Respondent be represented by State Attorney.
 2. That the Court erred in law to order that the suit needed a 90 days' notice for it being instituted.
 3. The court erred in law and fact to decide that relief prayed by the appellants could not be granted.
 4. That the whole decision was against the law. 4 When the appeal was placed before me for hearing on 27 May, 2021, the appellant appeared but the respondent did not show appearance even after dully being served. The summons was issued through the process sever who informing this court that the respondent was served. The court clerk also summoned the respondent through audio teleconference. He informed the respondent that the hearing is set on 27 May, 2021 but he did show appearance. For that matter, this court decided to proceed exparte against the respondent. The appellant was represented by Mr. Mwanupanga, learned counsel. Mr. Mwanupanga opted to start with the second ground of appeal, he argued that the trial court in its Ruling dated 27th November, 2020 stated that Article 6 of the United Republic Constitution of Tanzania stated that the respondent is accounted as part of the Government therefore the appellant was required to issue a 90 days'

Notice in accordance to section 6 (2) of the Government Proceedings Act. He valiantly argued that the law does not restrict a party to institute a case against the District Commissioner on his own personality. Mr. Mwanaupanga fortified his submission by referring this court to the case of I.G. Lazaro v Josephine Mgomela, Civil Appeal No. 2 of 1986, the Court of Appeal of Tanzania decided that in tort cases the tortfeasor is always liable regardless that he has done so under his position. 5 With respect to the first ground that the trial court erred in law to allow the State Attorney to represent the respondent, Mr. Mwanaupanga argued that the respondent was sued in his own name. He valiantly argued that in the Tanzania Advocates Management System, Ms. Subira, learned State Attorney is not a practicing Advocate. To support his position he referred this court to section 34 (2) and 39 (1) (a) of the Advocate Act, Cap.341 [R. E 2019]. He went on to argue that the law does not allow any Advocate to practice without obtaining any practicing certificate. On the third ground which relates to relief sought by the appellant, the learned counsel for the appellant lamented that the trial court erred in law to rule out that the appellant's prayers cannot be granted. He argued that the reliefs sought are related to general damages for false imprisonment, general damages for malicious and general damages for trespass and possession of land. He asserts to argue that the trial Magistrate on page 3 of his ruling stated that all reliefs are related to land matters. Insisting, he argued that false imprisonment, malicious and trespass all fall under tort law and tort matter are tried at the District Court and Resident Magistrate Court. To support his submission he referred this court to the case of Albert Mlilo & Another v William Kaseke, Civil Appeal No.1 of 2015 at Mbeya (unreported). 6 Mr. Mwanupanga did not end there he stated that the remedy of land possession seems like a land matter but the appellant is seeking possession or recovering of the land. He seeks refugees in the book; titled Principles of tort Laws 4^o Edition by Vivian Harpwood specifically pages 67 and 68 and the case of Abdallah Ally Seleman Trading as Ottawa Enterprises (1997) v Tabata Petrol Station Ltd, Civil Appeal No.89 of 2017, the Court of Appeal of Tanzania at Iringa (unreported). He further contended that the trial court was supposed to proceed with determining the matter because the reliefs sought related to tort and the claims fall under the same cause of action thus the remedies are inseparable. Submitting on the fourth ground of appeal, Mr. Mwanaupanga was brief and straight to the point. He lamented that the whole decision was against the law because the trial court misdirected itself for allowing the State Attorney to represent the respondent, the appellant to issue a 90 days Notice while the respondent was sued on his own name and its finding that the reliefs sought were not related to tort. Insisting he stated that the trial court had the power to determine the case. On the strength of the above arguments, Mr. Mwanupanga beckoned upon this court to restore the suit, remit back the case file to proceed with the hearing and allow the appeal with costs. 7 Having summarized the facts of the case and submission of the learned counsel for the appellant, I now turn to confront the grounds of appeal in the determination of the appeal. I shall tackle the grounds of appeal in the order they appear as reproduced above. The main issue for determination is whether the appeal is meritorious. On the first and second grounds, the appellant complained that the trial court erred in law to allow the State Attorney to represent the respondent. In determining the first

preliminary objection trial court was guided by section 6 (2) of the Government Proceeding Act, Cap.5 [R.E.2019] which requires the person who intends to sue a Government to issue first a statutory notice to the relevant Government officer or institution and copy the said notice to the Attorney General. Section 6 provides that:- "No suit against the Government shall be instituted\ and heard unless the claimant previously submits to the Government Minister; Department or officer concerned a notice of not less than ninety days of his intention to sue the Government, specifying the basis of his claim against the Government; and he shall send a copy of his claim to the Attorney-General." [Emphasis added]. Applying the above provision of law, it is my respectful opinion that the same is inapplicable in the instant application since the appellant chose to sue the respondent in his own name. The parties to the suit are Obedi 8 Bagaile Masatu and another (original plaintiffs) and Cornel Magembe (original defendant). Therefore, as long as the respondent was sued by his own name he was required to appear in court in person or choose to be represented by an Advocate. And whatever proof he wanted to produce in court it was supposed to be tendered by his advocate and not the State Attorney. Therefore, this ground is answered in the affirmative. On the third and fourth grounds, the appellant claims that the trial court faulted itself for not granting the appellant's relief, thus, the whole decision was against the law. The record reveals that the trial court arrived at such findings after considered that the reliefs prayed are relating to the land matter. The appellant's Advocate was on his view that the reliefs were all related to tort. Records reveal that the appellant's in his plaint specifically paragraph 20 listed the alleged reliefs to include; defamation, malicious prosecution, trespass, and possession of the land. It is my respectful view that the reliefs averred in paragraph 20 of the plaint show that the appellant's reliefs were founded on tort. Therefore it cannot be assumed that the allegations in paragraph 20 of the plaint were proved without determining the suit to its finality. Had it been that the possession of land being seen as a remedy of land matter the same could have been rejected in his decision after analyzing the case. 9 Moreover, reading the plaint, I have noted that the appellant's reliefs arise from the same cause of action. This finding is getting support from the book by Takwani, titled: Civil Procedure with Limitation Act, 1963, 7th Edition where the author at page 240 stated that:- "The power to reject a plaint on this ground (where plaint does not disclose cause of action) should be exercised only if the court comes to the conclusion that even if all the a/legations set out in the plaint are proved, the plaintiff would not be entitled to any relief" Similarly, in the case of Abdallah Ally Selemani (supra) the Court of Appeal of Tanzania cited with approval the case of Richard Julius Rukambura v Issack Ntwa Mwakajila and Tanzania Railways Cooperation, Civil Appeal No.2 of 1998 (unreported). The court held that:- " There is no room for separating the claims based on the same cause of action. To sever or separate the claims as the courts below did, in this case, was not, in our view, the intention of the legislature in its wisdom. It was the intention of the legislature to allow certain claims based on the same cause of action to be entertained by the civil courts, it would have stated so in the law." The above excerpt and court authority render this court to observe that the alleged remedies fall under the same cause of action, the same cannot 10 be severed. Thus, I differ with the trial court findings and hold that the appellant's plaint should have not been

rejected, since the appellant's alleged reliefs' fall under the same cause of action which is inseparable. In the upshot, I hereby quash the order which strike out the suit. Dated 27 November, 2020. I proceed to restore the Civil Case No. 33 of 2002 and remit the case file to the Resident Magistrate Court of Mwanza to proceed with hearing where it ended before another Magistrate. Appeal allowed with costs. Order accordingly. Dated at Mwanza this date 31May, 2021. 71 / (JUDGE [az" 3t.05.2021 Judgment delivered on 31' May, 2021 via audio teleconference, ,,, --,,. / whereas Mr. Mwanaupanga, learned counsel for applicant was remotely present. cl, JUDGE 31.05.2021 Right to appeal fully explained. 11

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