IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: RAMADHANI, J.A., MROSO, J.A., And KAJI, J.A.)

CIVIL APPEAL NO. 40 OF 2003

BETWEEN

B.M. MBASSA..... APPELLANT
VERSUS
1.THE ATTORNEY GENERAL..... 1ST RESPONDENT
2. NO. B.7492 SGT. MILTON TANDARI..... 2ND RESPONDENT
3. NO. D.3841 PC SAMSON MALIMI..... 3RD RESPONDENT

(Appeal from the Order of the High Court of Tanzania at Bukoba)

(Masanche, J.)

dated the 15th day of April, 2003
in
Civil Case No. 4 of 1996

JUDGMENT OF THE COURT

KAJI, J.A.:

This appeal arises from the decision of the High Court at Mwanza (Masanche, J.) striking out the appellant□fs plaint in Civil Case No. 4 of 1996 for want of cause of action.

The facts of the case can briefly be stated as follows:

The appellant, BONAVENTURA MBASSA, owned some fishing nets. He entrusted them to his employee one JULIUS MSILA for fishing on his behalf.

On 23.12.93 the 2nd respondent, No. B 7492 SGT MILTON TANDARI, and the 3rd respondent No. D 3841 PC SAMSON MALIMI who were policemen stationed at Muleba Police Station, arrested the said employee on suspicion that the fishing nets were stolen property. They took him together with the fishing nets to Muleba Police Station, and later charged him in court with being found in possession of goods suspected to have been stolen or unlawfully acquired, contrary to Section 312 (1) (3) of the Penal Code, Cap 16. He was acquitted.

After his acquittal, his employer, the appellant, instituted a suit against the ATTORNEY GENERAL (1st respondent) and the 2nd and 3rd respondents claiming for, *inter alia,* compensation in the sum of Shs. 5,762,175.25, being loss and expenses arising out of the respondents□f seizure of his fishing nets, and arrest and malicious prosecution of his employee.

When the case was called on for hearing, both parties raised some preliminary objections. Mr. Katabalwa, learned counsel who was representing the appellant/plaintiff submitted orally in support of the appellant's preliminary objection. Mr. Mgangali, learned State Attorney who was representing the respondents/defendants also submitted orally in support of the respondents' preliminary objection. After counsel's submissions the learned trial judge did not make any finding. Instead he remarked as follows:-

> "Before the trial could start, both counsel, each on his part, sought to raise preliminary point. The pleadings never showed that any counsel would raise a preliminary point. Anyway, I allowed the counsel to tell me what they had to tell me by way of preliminary points.
>
> I have heard their preliminary points. I must confess that I will not deal with their preliminary points. This is because I have a preliminary point which is very preliminary to their preliminary points.
>
> My preliminary point is – Does the plaintiff have a cause of action against the defendants, if what we read in the pleadings are what the court will have to adjudicate upon?"

Upon that remark, the learned judge concluded by holding that the plaint did not disclose a cause of action. He accordingly struck it out.

The appellant was aggrieved; hence this appeal.

Before us the appellant is represented by Mr. Katabalwa,

learned counsel, who has prepared the following five grounds of appeal:-

1. That the learned trial judge erred in law and fact to strike out the appellant's case on the sole reason that he does not have a cause of action against the respondents.

2. That the learned trial judge grossly misdirected himself in law and fact to interpret the pleadings as showing that the case was filed on the tort of malicious prosecution when it was not.

3. That the learned trial judge misdirected himself for failure to note that in terms of paragraphs 4 and 9 of the plaint and annextures thereto the appellant was simply claiming for loss of income and expenses incurred at the hands of the respondents as a result of their actions in seizing his property and prosecuting his employee, and hence he has a cause of action.

4. That the trial judge erred in law to strike out the case without giving the appellant

an opportunity to amend his pleadings when the same were in law capable of being amended in order to show a cause of action.

5. That the learned trial judge erred in law to hold in effect that the appellant who was the employer of Julius Msila could not sue the respondents for their actions against his employee which caused him (employer) to suffer loss.

Mr. Katabalwa argued these grounds at length. But in essence what he said is that, after finding that the plaint did not disclose a cause of action, the learned trial judge should either have allowed the appellant to amend it or should have rejected it under ORDER VII Rule 11 (a) of the Civil Procedure Code, 1966 rather than to strike it out as he did. Further more, in his view, there was nothing wrong for the appellant to sue the respondents for the wrong they did to his employee. Mr. Katabalwa submitted further that the appellant's claim was not basically based on the tort of malicious prosecution, but that the appellant was simply claiming compensation for the loss of income and expenses he had incurred at the hands of the respondents as a result of their actions in seizing his fishing nets and prosecuting his employee.

On his part Ms Otaru, learned State Attorney, who represented the respondents, conceded that the learned trial judge should have

rejected the plaint after holding that it did not disclose a cause of action. She was of the firm view that the plaint really did not disclose a cause of action against the respondents because the suit touched also on malicious prosecution, and that a suit for compensation on malicious prosecution can only be instituted by the victim himself of the malicious prosecution and not by his employer.

It is common ground that the learned judge struck out the plaint because, in his view, it did not disclose a cause of action. The crucial issue is whether it was proper for the learned trial judge to strike out a plaint which in his view did not disclose a cause of action.

Discussing a similar issue in **JOHN M. BYOMBALIRWA v. AGENCY MARITIME INTERNATIONALE (TANZANIA) LTD.** (1983) TLR 1, this Court held as follows:-

> UNDER ORDER VII RULE 11 (A) OF THE CIVIL PROCEDURE CODE, WHERE THE PLAINT DISCLOSES NO CAUSE OF ACTION, THE COURT IS TO REJECT IT AND NOT DISMISS IT.☐H

THE MEANING OF THIS HOLDING IS THAT, WHERE THE PLAINT DOES NOT DISCLOSE A CAUSE OF ACTION THE PROPER ACTION IS FOR THE COURT TO REJECT IT. IN THE INSTANT CASE, AFTER THE LEARNED TRIAL JUDGE HAD HELD THAT THE PLAINT DID NOT DISCLOSE A CAUSE OF ACTION, HE SHOULD HAVE REJECTED IT UNDER ORDER VII RULE 11 (A) OF THE CIVIL PROCEDURE CODE, 1966, AND NOT STRIKE IT OUT. ON THAT GROUND ALONE, AND FOR THE REASONS STATED,

WE ALLOW THE APPEAL, QUASH THE ORDER OF STRIKING OUT THE PLAINT AND SUBSTITUTE THEREAT WITH AN ORDER OF REJECTING THE PLAINT.

COSTS TO FOLLOW THE EVENT.

DATED at DAR ES SALAAM this 13th day of May, 2005.

A.S.L. RAMADHANI
JUSTICE OF APPEAL

J.A. MROSO
JUSTICE OF APPEAL

S.N. KAJI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(S.M. RUMANYIKA)
DEPUTY REGISTRAR