

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

CIVIL APPEAL NO. 104 OF 2018

(ARISING FROM NAKASONGOLA CIVIL SUIT NO. 11 OF 2014)

MUSOKE FRED.....APPELLANT

V

GEORGE MUWONGE WILLIAMRESPONDENT

BEFORE HON. LADY JUSTICE HENRIETTA WOLAYO

JUDGMENT

A. Introduction

1. On October 11, 2018, the Appellant Musoke Fred through Mugalula and Omalla Advocates appealed the judgment of Her Worship Agatonica Mbabazi chief magistrate sitting at Nakasongola chief magistrate's court dated May 4, 2018 on seven grounds of appeal contained in a memorandum of appeal that I shall revert to later in the judgment. The Respondent opposed the appeal and filed grounds in reply contained in an affidavit in reply.
2. On May 14, 2019, the appealed was called for hearing but only the Appellant and his advocate were in attendance. On May 21, 2019, hearing was ordered by written submissions and counsel were both given a schedule for filing. On May 31, 2019, counsel for the Appellant filed his written submissions while the Respondent's counsel filed on August 23, 2019 and the Appellant's advocates filed a rejoinder on September 4, 2019. I have carefully considered the written submissions filed by both counsel and addressed myself to the authorities cited therein.

B. Duty of first appellate court

3. I am mindful of my duty as the first appellate court to re-appraise the case in the trial court and evidence adduced and arrive at my own conclusions on matters of fact and law which I have done.

C. Re-evaluation of evidence

4. From my study of the court record, the following facts emerge. The parties had a long standing dispute outside the court system from as far back as 1988. In 1988, according to un-translated documents marked 1, 2, and 3 attached to the plaint, Musoke acknowledges causing injury to Muwonge's cow and the matter was settled amicably with clansmen.
5. On March 23, 1993, Muwonge complained to the LC II Chairman of Kalengedde that Musoke was encroaching on his land. The document in Luganda is marked 4 and attached to the plaint.
6. On November 14, 2013, Criminal Case No. 275 of 2013 was commenced against Muwonge by a criminal summons issued on November 14, 2013 for Muwonge to answer charge of Criminal Trespass c/s 302 of the penal Code. On December 11, 2013, Muwonge was charged and released on cash bail. After several appearances before the chief magistrate of Nakasongola, on March 13, 2014, the dispute emerges with clarity when Musoke states that he is a kibanja owner on the Muwonge's land and that the latter was forcing him out without compensation. Muwonge responded that he had offered to compensate Musoke but that the latter was giving him hard conditions. The court then made the following entry:

'There is no criminality in this case. Criminal trespass since 2003 cannot stand. The dispute between the parties is land as between landlord and tenant. The matter is purely civil and the parties should go to a civil court. These proceedings are therefore terminated.' Signed Chief Magistrate.

7. Prior to this court entry, parties had been engaged in negotiations facilitated by the LC 1 of Namasa village Kato Livingstone and on February 20, 2014, the parties sat in the presence of several people and reduced their agreed position in writing whereby Muwonge agreed to compensate Musoke 14,000,000/ to be paid in instalments from March 2014 to September 2014.

8. It seems that the chief magistrate in making the entry was influenced by a letter from one E.W. Iga KIPU Foundation dated February 24, 2014 addressed to the chief magistrate in which he informed the court of the agreement between the parties for Muwonge to pay Musoke 14,000,000/ as compensation.
9. Thereafter on July 17, 2014, Muwonge filed Nakasongola Civil Suit No. 11 of 2014 against Musoke for malicious prosecution. Surprisingly, Muwonge in his plaint narrates the entire criminal process of the criminal proceedings and how there were efforts at settlement and how he prayed for continuation of the criminal proceedings after Musoke demanded for removal of barbed wire and opening the road.
- 10 It was not disputed that Muwonge is the registered proprietor of Plot 11 and 13 Buruli 1 Block 102 Mukokwa, Luwero the land on which Musoke claimed a kibanja, the existence of which was not disputed by Muwonge in his plaint and in the negotiations before the LC Kato nor in the Luganda documents attached to the plaint.
- 11 A copy of the charge sheet is not on record but a criminal summons that was issued on November 14, 2013 by the chief magistrate's court in Criminal Case No. 273 of 2013 against Muwonge disclosed the offence of Criminal Trespass c/s 302 of the Penal Code Act. The offence is defined in the following terms
Any person who enters into property of another with intent to annoy or commit an offence or intimidate; Or having entered lawfully, remains there with intent to intimidate, insult, annoy any person, commits the misdemeanour of criminal trespass.
- 12 The fact that the two parties had a long running dispute as between mailo owner on the one hand and kibanja holder on the other is evidence of friction between the two.

Counsel for the Appellant correctly summarised the key elements of a malicious prosecution reiterated by the Court of Appeal in **Dir. Bishop Okille v Mesusera Eliot and another COA Civil Appeal No. 29 of 1997** that reaffirmed the precedent of **Mbowa v East**

Mengo Administration [1972] EA 352 where a four-way test for determination of a malicious prosecution was pronounced as follows.

- a) The criminal proceedings must have been instituted by the defendant who was instrumental in setting the law in motion against the plaintiff.
- b) The defendant must have acted without reasonable or probable cause.
- c) The defendant must have acted maliciously with an improper or wrong motive.
- d) The criminal proceedings must have terminated in the plaintiff's favour.

13 While the facts of the present case meet the first part of the test, i.e., the arrest was at the instigation of Musoke the current Appellant, they do not meet the rest of the test. The fact that the two parties had a long running dispute since as far back as 2003 over the same land which Musoke accused Muwonge had trespassed means the complaint was not motivated with malice. Secondly, there was probable cause for the prosecution especially as Muwonge had not compensated Musoke as agreed during mediations meetings. Moreover, Muwonge in his evidence admitted he had not opened the road nor removed his barbed wire from the land as demanded by Musoke, facts that disclosed elements of criminal trespass. Lastly, while the prosecution was terminated, it was not clear in whose favour since the trial magistrate merely declared that the dispute was purely civil and not criminal and proceeded to terminate the case without going into the evidence. This means the last part of the test that requires the case to end in favour of the plaintiff was not met.

14 In the result, the trial magistrate erred when she held that Muwonge had proved the tort of malicious prosecution.

15 I now turn to the grounds of appeal. The Appellant raised seven grounds of appeal which I will consider in groups.

D. Ground one: the learned trial magistrate wrongly evaluated the evidence and law and arrived at a wrong conclusion.

Ground five: the learned trial magistrate grossly erred when she upheld an action of malicious prosecution against the Appellant where there was no evidence of malice or absence of reasonable and probable cause against the Respondent.

17. I have found above that the learned trial magistrate erred when she found that the prosecution of the Respondent for criminal trespass had been malicious yet there was probable cause to prosecute him given the accusations of placing barbed wire on the disputed land on which the Appellant had a kibanja and blocking the access road for the Appellant. I am unable to agree with counsel for the Respondent that the prosecution was motivated with malice since the Appellant could have filed a civil action. I find this reasoning flawed because the existence of a civil remedy does not bar a criminal action if the law permits it as in this case. These two grounds of appeal succeed.

E. Ground two: the learned trial magistrate erred when she relied on unlawfully terminated criminal proceedings as a basis for malicious prosecution.

Ground three: the learned trial magistrate unlawfully and illegally relied on criminal proceedings in a claim for malicious prosecution where the Respondent was never prosecuted.

18. Counsel for the Appellant submitted that the manner in which the presiding chief magistrate terminated the criminal prosecution was outside the law as he did not cite any law. Counsel for the Respondent submitted that the decision ended in the Respondent's favour.

19. This appeal is not about the criminal case, so I will not direct my attention to the lawfulness or otherwise of the termination of the

criminal proceedings. Nevertheless, I have found above that the termination of the criminal trespass charge did not lead to acquittal of the Respondent which implies that it did not unequivocally end in his favour. Therefore, the trial magistrate erred in her conclusion that the prosecution was malicious. This ground succeeds.

F. Ground six: the learned trial magistrate erred when she upheld an action of malicious prosecution against the Appellant where the Respondent had agreed to compensate the Appellant.

20. I have found above that the failure to compensate the Appellant is tied up with the other conduct of the Respondent including fencing the disputed land and blocking the access road to the land, facts which were potentially a basis for criminal trespass. The submission by counsel for the Respondent that the criminal case and the agreement to compensate have no relationship is without merit. This ground succeeds.

G. Ground four: the learned chief magistrate erred when she upheld an action for malicious prosecution against the Appellant instead of the State Attorney.

21. Counsel for the Appellant submitted forcefully that the DPP was the prosecutor and therefore the suit was brought against the wrong party. Under the common law, the prosecutor is also the complainant and the tort of malicious prosecution will be brought against either the complainant or state or both. The authority of **Gitau v Attorney General [1990] KLR 13** is not helpful to counsel because it supports the existing position that the tort of malicious prosecution can be brought against a complainant. I am in agreement with the submissions of counsel for the Respondent in this regard that the Respondent lawfully sued the Appellant.

H. Ground seven: the learned trial magistrate wrongly and erroneously exercised her discretion in awarding the Respondent 30,000,000/= as general damages.

22. Having found that the learned trial magistrate erred in concluding that the Appellant was liable for malicious prosecution of the Respondent, I need not discuss this ground which automatically succeeds.

I. Summary of findings on appeal

23. The learned trial magistrate failed to properly evaluate the evidence against the law and thereby arrived at a wrong conclusion that the Appellant had maliciously caused the prosecution of the Respondent for criminal trespass.

J. Orders

- a) This appeal succeeds
- b) The judgment and orders of the trial court are set aside.
- c) The Respondent shall pay the Appellant costs of this appeal and the trial court.

DATED AT KAMPALA THIS 24TH DAY OF FEBRUARY 2020.

HON. LADY JUSTICE HENRIETTA WOLAYO

Legal representation

Mugalula & Omalla **Advocates** for the Appellant

Mark Mwesigye & Co. Advocates; Mujurizi, Alinaitwe & Byabakama
Advocates for the Respondent