THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

(CIVIL DIVISION)

MISCELLANEOUS APPLICATION NO. 498 OF 2019

(ARISING FROM CIVIL SUIT NO. 50 OF 2019)

FRIECCA PHARMACY LIMITED---------- APPLICANT

VERSUS

ANTHONY NATIF…….. RESPONDENT

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

This is an application to strike out the respondent's/plaintiff's plaint in Civil suit No. 50 of 2019 brought under Section 98 of the Civil Procedure Act, Section 33 of the judicature Act Order 6 rule 28 & 30, and Order 7 rule 11(a) & (e) of the Civil Procedure Rules.

The applicant filed civil suit No. 731 of 2017 against the respondent, National Drug Authority & Guardian Health Ltd for a permanent injunction to restrain National Drug Authority from authorising, allowing and licensing the 2nd defendant-Guardian Health Ltd and the respondent from operating a pharmacy at Plot 210 Kibuga Block 38 situate immediately next to Plot 160 Hajj Musa Kasule Road, Wandegeya or any other place within the radius of 200 (200) meters from the said Plot 160 Haj Musa Kasule Road..

The defendants in that matter raised a preliminary point of law that the plaint raises no cause of action and or suit is premature. The court agreed with the defendants' submission and dismissed the suit as being premature.

As a result of the said preliminary dismissal of the applicant's civil suit No. 731 of 2017, the respondent has founded a cause of action for malicious prosecution and filed the present suit. The applicant has applied to have the said suit struck out for not disclosing a cause of action and for being frivolous and vexatious.

The respondent brought the present suit contending that HCCS No. 731 of 2017 was brought maliciously and without reasonable cause against the respondent.

Applicant's submission

The applicant's counsel submitted that to found a suit in malicious prosecution, the court enumerated the essential ingredients at page 354 of **MBOWA VS. EAST MENGO ADMINISTRATION [1972] 1 EA 352** thus:

1. ***The criminal proceedings must have been instituted by the defendant, that is, he was instrumental in setting in motion the law against the plaintiff…;***

2. ***The defendant must have acted without reasonable or probable cause…;***

3. ***The defendant must have acted maliciously. In other words the defendant must have acted, in instituting criminal proceedings, with an improper motive, that is, he must have had " an intent to use the legal process in question for some other than the legally appointed and appropriate purpose";***

4. ***The criminal proceedings must have terminated in the plaintiff's favour, that is the plaintiff must show that the proceedings were brought to a legal end and that he has been acquitted of the charge"***

At page 355, the court concluded the point on an instructive note:

> **"It seems to me that the plaintiff, in order to succeed, has to prove that the four essentials or requirements of malicious prosecution, as set out above, have been fulfilled and that he has suffered damage, In other words, the four elements 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 approach was followed by the Court of Appeal of Uganda in **DR. BISHOP OKILLE VS. MESURERA ELIOT & JACOB CACA 29/1997.**

The Applicant contends and submits that the Respondent's plaint in HCCS 50/2019 does not reveal a maintainable cause of action and ought to be struck out and the suit dismissed with costs because of the following reasons:

a) It results from Commercial Division HCCS 731/2017 Friecca Pharmacy Ltd Vs. NDA & Others. That suit was a civil matter and not a criminal suit. We contend on the above binding authorities that in Uganda, a suit in the tort of malicious prosecution cannot be founded on civil matters.

b) The impugned plaint in HCCS 50/2019 does not plead that the Applicant was motivated by or acted with malice in instituting HCCS 731/2017 in the Commercial Division. On the above authorities, the applicant contends that a plaintiff cannot seek to prove that which he has not pleaded. Without the necessary ingredient of malice, no successful cause in malicious prosecution can me maintained;

c) HCCS 731/2017 never terminated in the Respondent's favour or at all, the Learned Lady Justice ruled:

"However, courts cannot be petitioned to correct an anticipated wrong. Therefore, the case is dismissed until the defendant takes action as regards granting the relocation approval to the 2nd and 3rd defendant. ***In case the plaintiff feels aggrieved by the 1st defendant and has proof that its rights have been violated, then the case can be reinstated and proceed to hearing" (emphasis)***

d) From the above authorities, we contend that the legal (criminal) proceedings must have finally terminated for the plaintiff to found a cause in malicious prosecution on them. From Justice Alividza's ruling, it is plain that the Applicant herein is still at liberty to reinstate HCCS 731/2017 and set it down for hearing. In other words, that suit has in fact never terminated. Justice

Alividza's orders were not final orders. The respondent cannot use that ruling as the foundation of his case in malicious prosecution.

HCCS 50/2019 IS AGAINST THE PUBLIC POLICY

The Applicant submitted that under Articles 126 and 127 of the Constitution, 1995, it is encouraged for people to resolve their disputes in a civilized manner through the process of Courts of law. Thus, access to Courts should be easy and should not be punished.

Thus, where a suit is instituted without a cause of action, the Courts usually dismiss the cause with costs. The unsuccessful litigant is not saddled with yet another suit in damages. This sufficiently compensates the successful applicant, brings an end to litigation and promotes reconciliation rather than animosity between the litigants.

This is to be contrasted with suits in the tort of malicious prosecution where the aim is to compensate the acquitted person whose liberty would have been taken away and put to inconvenience in the criminal justice system that does NOT provide an avenue of ordering costs in favour of the successfully Acquitted person. This is indeed the key difference.

In our view, if Courts were to allow every successful applicant to sue in malicious prosecution, we contend that the Courts will open up a floodgate of unworthy suits and clog access to Courts. Often time, suits are lost because of technical mistakes of counsel. It will be absurd to saddle litigants with damages only because their counsel misadvised or mis-executed on a failed legal suit.

Paragraphs 5 and 6 of the plaint in HCCS 50/2019 all prove the point Mr. Peter Walubiri makes in his paragraph 9, 10, 11, 12 and 13 of the affidavit in support thus: HCCS 50/2019 is a case of a bad loser and a hangover from HCCS 731/2107.

Respondent's submissions

The respondent's counsel raised a point of law to the effect that the Affidavit in support of the Application by Peter Mukidi Walubiri is incurably defective for failure to attach proof that he is authorized to swear the affidavit on behalf of the

company. In Paragraph 1 of the Affidavit, Peter Mukidi Walubiri depones that he is Secretary of the company and duly authorized to depone the affidavit in that capacity. A secretary can only act on behalf of a company upon authorization. But he attaches no such proof of authorization.

In ***Owori Media and anor v Ecobank Uganda Limited MA. NO. 1105 of 2014***; it was held that a company can only act through its directors, authorised agents or holders of powers of attorney. And where it acts through an authorized agent, proof of authorisation has to be attached to the Affidavit. In ***Niko insurance (U) Limited V Southern Union Insurance Brokers Ltd and Ors M.A NO. 817 of 2015***; **pages 21 to 22 Madram J observed as follows;**

"*In the case of Lena Nakalema and 3 Others vs.Mucunguzi Myers (supra) no authority of the other Respondents was included. Honourable Justice Andrew Bashaija held that whether it is a representative action under Order 1 rule 10 (2) and 13 of the Civil Procedure Rules or a suit by a recognised agent under Order 3 rule 2 (a) of the Civil Procedure Rules or by order of the court, the person swearing on behalf of others ought to have their authority in writing which must be attached as evidence and filed on court record. He further cited several other authorities to the effect that an affidavit is defective by reason of being sworn on behalf of another without showing that the deponent had the authority of the other. In the premises he held that the affidavit was incurably defective for non-compliance with the requirements of the law and cannot support the application and was dismissed.*

I have carefully considered the decision of my learned brother and I do not see any grounds for departing from it. The ruling applies to both affidavits in support and in the reply so long as they purport to be made on behalf of other parties. The decision is also consistent with Order 1 Rule 12 of the Civil Procedure Rules which requires the authority to be in writing and signed by the party giving it.In this case the affidavit of Dr. Juliet Kamuzze is not only sworn in a representative character and for emphasis not in the capacity of an Advocate having conduct and swearing to non-contentious matters but it is on behalf of the 1st, 2nd, 3rd, 4th, and 5thRespondents. The first Respondent is a limited liability company and the rest of

the other Respondents are individual directors residing in different places and countries. <u>While Dr. Juliet Kamuzze may be Counsel for the first Respondent on whose behalf Messrs Fides Legal Advocates filed a written statement of defence in the main suit, there is a requirement to show how she was instructed by the directors of the first Respondent</u>.

By reason of the foregoing, since Peter Mukidi Walubiri was deponing not as advocate or director but as person authorized by the company, he should have attached the written authorization from the directors of the company to his affidavit. Having failed to do, the affidavit is incurably defective and should be struck out. This would leave the application without any supporting affidavit which would make it incompetent. It should be struck out.

The respondent further submitted on whether a suit of malicious prosecution can arise from civil proceedings by citing <u>Section 14(2)(b) of the Judicature Act</u> (cap 13) whose commencement date is 17th May 1996. It provides that the jurisdiction of the High Court of Uganda shall be exercised in conformity with the written law, or where there is no written law, in conformity with the common law and doctrines of equity. The common law therefore forms part of the law of Uganda.

<u>Black's Law Dictionary by Bryan Garner 8th ED at page 977</u> defines Malicious Prosecution as follows;

"*The institution of a criminal or <u>civil proceedings</u> for an improper purpose. The tort claim resulting from the institution of such legal proceeding.*

The tort requires an adversary to prove four elements; (1) the initiation or continuation of a law suit; (2) lack of probable cause; (3) malice; and (4) favourable termination of the lawsuit.

The tort claim resulting from the institution of such a proceeding. Once a wrongful prosecution has ended in the defendant's favour, he or she may sue for tort damages;"

The question whether the tort of malicious prosecution could arise from civil proceedings was recently considered by the Supreme Court of England in ***Willers v Joyce 2016 (UKSC) 43***. At para 60, Lord Clarke stated as follows;

"*The principal issue in this appeal is whether the tort of malicious prosecution includes the prosecution of civil proceedings. I would firmly answer that question in the affirmative".*

He continued at *para 86* thus;

"*The question here is whether there is a tort of malicious prosecution of civil claim. For my part, I can see no sensible basis for accepting that the tort of malicious prosecution of a crime exists in English law, whereas the tort of malicious prosecution of a civil action does not. Not only are the ingredients the same, but it seems to me that, if a claimant is entitled to recover damages against a person who maliciously prosecutes him for an alleged crime, a claimant should also be entitled to recover damages against a person who maliciously brings civil proceedings against him. The latter class of case can easily cause a claimant very considerable losses. They will often be considerably greater than in a case of malicious prosecution of criminal proceedings."*

This 2016 decision was an affirmation that the tort of malicious prosecution arising from civil proceedings formed part of the common law.

It was the respondent's counsel that the Uganda cases cited are outdated and have not canvassed the new tort. Therefore, the issue whether such a tort can arise from civil proceedings has never been considered and remains alive in Uganda. But the fact that it has never been argued for should not be of any concern. In ***Malone v Metropolitan Police Commissioner (1979) Ch. 344***, at page 372, Sir Robert Megarry V.C said the following in the context of the then new tort of invasion of privacy;

"*I am not unduly troubled by the absence of English Authority. There has to be a first time for everything and if the principles of English law and analogies from existing rules, together with requirements of justice and common sense, pointed*

firmly to such a right existing, then I think the court should not be deterred from recognising the right."

Similarly, in ***Buttes Gas & Oil Co. v Hammer (Nos. 2&3) (1982) AC 888***, pages 936-937, Lord Wilberforce stated as follows;

"*when a judicial approach to an identical problem has been spelt out with such articulation in a country, one not only so closely akin to ours in legal approach but the fabric of whose legal doctrine in this area is so interwoven with ours, spelt out in convincing language and reasoning, we would be unwise not to take the benefit of it*."

Ultimately, unless there are principled reasons for not doing so, to which we turn next, then the tort should be recognized in Uganda as part of the common law.

The respondent's counsel further submitted that the Applicant mentions a number of public policy reasons why the tort should not be allowed thus; access to court should be easy and not punished; that costs are a sufficient compensation for dismissed suits; and the floodgates argument that those with unmeritorious claims will clog courts. But these are very old arguments which were raised and refused in *Willers v Joyce*. We respond to each of them as follows.

Although access to courts should not be punished, the public policy grounds for recognizing the tort far outweigh the fear of punishment and vindictive actions. In Willers v Joyce at paras 46 and 66, the court noted the public policy behind the tort. It echoed the words of *Holt CJ in Savile v Roberts*,

"*if this injury be occasioned by a malicious prosecution, it is reason and justice that he should have an action to repair him the injury*."

It concluded that this appeal to justice is both obvious and compelling. That;

"it is instinctively unjust for a person to suffer injury as a result of the malicious prosecution of legal proceedings for which there is no reasonable ground, and yet not be entitled to compensation for the injury intentionally caused by the person responsible for instigating it".

This public policy reason applies to both civil and criminal prosecutions and there is no reason why it cannot apply to Uganda.

Fear of punishment and vindictive actions.

On the argument that if the tort is available it may deter those who have valid civil claims from pursuing them for fear that if the claim fails they may face a vindictive action for malicious prosecution, the court In Willers v Joyce noted at para 46 that;

""this was the argument advanced 300 years ago in Savile v Roberts for not allowing the tort in criminal proceedings. I am not persuaded that it has greater merit in relation to civil proceedings. There are many deterrents to litigation (uncertainty, time, expense, etc), some of which may be stronger than others. A claimant who brings civil proceedings on an improper basis exposes himself to the risk of having to pay indemnity costs, but I am not aware of evidence that this has deterred those with honest claims from pursuing them. One can always hypothesise that an honest litigant who has not been put off from bringing a claim by the risk of the judge (wrongly) deciding that he had acted improperly and making an indemnity costs order might nevertheless be put off by the extra risk of an opposing party bringing a vindictive action for malicious prosecution, but there is no way of testing the hypothesis and it seems to me intrinsically unlikely.

For similar reasons and for reasons that this is a speculative argument which can never be tested, this argument should fail.

The floodgates argument.

On the argument that people with bad claims will bring them, the court in *Willers v Joyce* at para 44 said as follows;

"*the argument that a good claim should not be allowed because it may lead to someone else pursuing a bad one is not generally attractive".*

It is therefore no answer to say that one claim should be refused because others with bad claims may also lodge theirs. Justice is an individual right and each case is to be assessed on its own merits.

The respondent submitted that the fears for unfounded claims clogging the courts are exaggerated. The bar for instating malicious prosecution claims is high. A Plaintiff has to show malice. And it is not the case that every case filed will be prosecuted with malice. This has acted as a useful sieve in criminal proceedings and should also act as a sieve for civil proceedings. But ultimately, whether malice exists or not is a matter of evidence at trial.

Costs being adequate compensation.

On costs being an adequate remedy, the court in *Willers v Joyce* called this argument a fiction. Costs can never be an adequate remedy where the defendant suffers loss over in excess of costs. It said as follows in para 58.

"*On the other hand, the notion that the costs order made has necessarily made good the injury caused by Mr Gubay's prosecution of the claim is almost certainly a fiction, and the court should try if possible to avoid fictions, especially where they result in substantial injustice*".

Therefore, where a defendant suffered damage over and above the costs, that is damage which can be properly sought in a malicious prosecution claim. Thus at para 22, the court noted that "*an action would lie if the defendant maliciously invoked civil process against the plaintiff which resulted in the plaintiff suffering a recognised head of damage".* Similarly, at para 43, "….*I see no difficulty in principle about the heads of damage claimed by him (damage to reputation, health and earnings), subject to the fundamental question whether his action is maintainable in law.*

Therefore, as our present case shows, in some instances, costs can never be an adequate remedy. For instance, it can never replace lost business. Moreover, no costs were awarded in the first suit.

Finally, we submit that the submission of the Applicant in para 2.6(b) that no malice was pleaded is confounding. The Plaint in *HCCS No. 50 of 2019* clearly pleads malice in paragraph 5. Whether the malice pleaded existed or not is a matter of evidence for trial and cannot be preempted at this stage.

Determination

The respondent has raised a point of law that the said Walubiri Mukidi has deposed an affidavit without authority since there is no authorisation attached.

I find no merit in the said objection since the said Walubiri Mukidi deposed an Company Secretary and not as an advocate. The cases cited are not applicable since the persons who had deposed where advocates with no instructions to depose on behalf of the company.

It would be taking it too far to find that every employee of the company should have authorisation to swear on matters of the company. The law presumes that certain categories of employees to have ostensible authority to act for the company.

Order 29 rule 1 of the Civil Procedure Rules provides;

In a suit by or against a corporation any pleading may be signed on behalf of the corporation by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case.

I believe this order is quite clear and unambiguous.

Whether the cause of action of malicious prosecution may arise from civil proceedings.

The tort of malicious prosecution has been known to arise out of criminal prosecution. It is intended to check false accusation of innocent persons that the tort was developed. Whenever a person is prosecuted on a criminal charge or any other charge reflecting his character, a moral stigma is generally attached to his fame, thus making a clear case for damage.

The tort has been known refer to prosecution of criminal proceedings and not civil proceedings. But for purposes of this tort it is now expanding to include any other proceedings which reflects the plaintiff's honour or character e.g liquidation or bankruptcy or Insolvency proceedings.

This court agrees with submission of counsel for the respondent to the extent that in deserving cases a tort of malicious prosecution can be founded in civil proceedings. But it is rather clearly made out when brought out as abuse of court process. An action or proceeding will be an abuse of process if there is no basis or foundation for it or where it is used for an extraneous purpose.

Under the tort of abuse of legal process, it must be shown that the legal or judicial process was used by the defendant for an improper purpose. It is not necessary to prove want of reasonable and probable cause or that the proceedings have terminated in the plaintiff's favour.

The present case does not fall in that category of deserving cases to be categorised as malicious prosecution since the nature of the case is an extension of a business dispute or rivalry that arose from Commercial division of the High Court. The number of defendants is not the same but rather one of them has felt it was malicious prosecution. What the respondent has set out as particulars of malice are wanting and merely premised on sentiments and rather not factual.

It must be noted that 'malice' cannot be inferred in the absence of 'reasonable and probable' cause. It can only be inferred on the basis of facts and circumstances of each case because it cannot be proved by direct evidence. Intention of man even the devil knoweth not. In fact, the gist of the action of malicious prosecution is malice and improper motive. "Malice" and "without reasonable and probable" cause" are two distinct ingredients for an action for malicious prosecution, which the plaintiff must prove. In other words, he should prove that the proceedings were initiated with malicious spirit and not in furtherance of justice.

The court ought to consider the public policy in entertaining actions arising out of previous court proceedings in order to decline to expand the tort of malicious prosecution and endless litigation. In the case of ***Sheldon Appel Co. vs Albert & Oliker, 47 Cal. 3d 863, 873 (1989)*** *California Supreme Court* noted;

" *While the filing of frivolous lawsuits is certainly improper and cannot in any way be condoned, in our view the better means of addressing the problem of*

unjustified litigation is through the adoption of measures facilitating the speedy resolution of the initial lawsuit and authorising the imposition of sanctions for frivolous or delaying conduct within that first action itself rather than through an expansion of opportunities for initiating one or more additional rounds of malicious prosecution litigation after the first action has concluded".

The respondent's case falls short of the requirements of malicious prosecution and this out has a duty to bring litigation to an end between the parties. The plaint is struck out.

In the result for the reasons stated herein above this application is allowed with no order as to costs.

It is so ordered.

SSEKAANA MUSA
JUDGE
20th/12/2019