IN THE HIGH COURT OF THE UNITED REPUBLIC TANZANIA

DAR ES SALAAM SUB REGISTRY

CIVIL APPEAL NO. 27281 OF 2023

(Appeal from the Judgment and Decree in Civil Case No.10 of 2022 of the District Court of Kigamboni at Kigamboni Hon. J. H. Mwankenja SRM, dated 11th September 2023.

RENATUS MICHAEL MUSHI..... APPELLANT

VERSUS

REV. WILLIAM SEGELA.....1ST RESPONDENT

THE BOARD OF REGISTERED TRUSTEES OF TANZANIA ASSEMBLIES OF GOD (THE KINGDOM OF GOD) .....2ND RESPONDENT

JUDGMENT

23rd May & 8th July 2024.

KIREKIANO, J:

The appellant herein is a resident of Kigamboni at Kibada. The appellant's relationship with the respondents stems from the first respondent's activities; it was alleged in the District Court at Kigamboni that in 2018, the first respondent registered and erected a church building at Kifurukwe—Kibada. The first respondent operated a church service from Thursday to Sunday, from morning to midnight, where prayers and music were played louder, and noise sounds from the church were caused by the music systems.

It was the appellant claim that after enduring the situation for a considerable period, he decided to sue the respondents on the grounds of nuisance, seeking several reliefs, including damages, a permanent injunction, and costs.

The trial court considered three issues; the existence of a tort of nuisance and the damages suffered and reliefs, ruled in favor of the respondent. The trial court stated that no tort of nuisance was proven. This decision left the appellant dissatisfied, leading to the current appeal, which is based on six grounds of appeal thus;

1. *That the trial Magistrate erred in law and fact when it failed to observe that the respondent's church was located in a residential area close to the appellant's house. Therefore, there was continuous nuisance or interference with the appellant's comfort.*
2. *That the trial Magistrate erred in law and fact by failing to observe that the respondents testified that to have been given permission to conduct church service at the residential area (their premise)) no evidence tendered by the respondents to back up their testimony, hence the noise was unlawful.*
3. *That, the trial Magistrate grossly misdirected himself as there was no proof of registration of Trustees of Tanzania Assemblies of God tendered by the respondent hence lawful existence of the said church is entirely in question.*

4. *That the trial Magistrate erred in law and fact that the appellant sued for private nuisance; the best evidence comes from the victims. Therefore, it was immaterial not to consider the appellant's testimony that he suffered damage as a result of lack of sleep due to the respondent's unreasonable interference.*

5. *The trial court misdirected on relying on the evidence of the affidavit leaving behind the evidence by P1 and PW2 which was sufficient*

6. *The trial Magistrate erred in law and fact, as he failed to evaluate evidence and thus entered a decision against the weight of evidence on record. The respondents filed to demonstrate their lawful permission from the statutory authority to conduct their services near the appellant's house (residential area).*

Before I go further, I find it apt to appreciate the case's evidence as it appeared during the trial.

Briefly stated, the plaintiff, now the appellant (PW1), is a resident of Kibada Kigamboni. In 2017, he experienced a disturbance in music and sounds day and night, and he could not sleep, which affected his ability to make a lecture. He reported this to the local government in his area. His complaint to the local authority appeared to have angered the respondent but did not yield a result. He reminded the respondent through WhatsApp messages whose affidavit was tendered Exbit P1.

PW2 Elizabeth Kambanyuma, her spouse, supported the appellant's case. She said they tried to resolve the matter amicably without success. She said noise pollution was causing disturbance, though she did not measure the sound level.

The defence case was denial of an allegation of nuisance; the 1st respondent/defendant, DW1 William Segera, is the pastor of the 2nd respondent church. According to him, his church conducts services on Wednesday from around 04:30 to 06:00 P.m., Friday from 4:30 am – to 06:00 pm, and Sunday from 9:00 am to 1:00 P.m. He denied conducting service day and night hours and not causing a nuisance to the appellant. He also rejected the contents of the affidavit tendered by the appellant. DW2 Grace Mtinda, one of the worshipers in the respondent's church, corroborated DW1's testimony on the time of church service.

In dismissing the suit, the trial court reasoned that there was no cogent evidence adduced to prove that the alleged nuisance exceeded the minimum standard of a nuisance. As such, there was no evidence proof of whether the alleged nuisance was unlawful and unreasonable.

When the appeal was placed before me for hearing, the appellant had the services of Miss Demetria Mwijage, a learned advocate. In contrast, the respondent had the services of Mr Khalid Sudy Rwebangila, a learned advocate. The parties made written submissions.

In support of the appeal, Miss Mwijage, on the 1st **ground** referred to page 9, that DW2 testified that the Church was located near the appellant's house and argued that, without validity of the Church's existence at the said area and proof of permission to conduct church services, suffice to say there was unreasonable and unlawful direct interference, and the interference was continuous. She cited **Sadhu Construction Company Limited V Peter E.M Shayo [1984] TLR to the effect that** nuisance to be actionable must be such as to be an actual interference with the standard of the average man.

The second and third grounds are interrelated. She argued that the trial record clearly shows that the respondents did not tender evidence that they had permission to build and conduct church services in the residential area. There was no proof of registration of the Church as a religious organization with a documented registration history.

According to her, failure to have proof of lawful authorisation to conduct church services near the Appellant's residential area constitutes a nuisance. She argued that it was upon the respondent to prove the existence of the authorization to operate a church in a residential area.

On the fourth ground, Miss Mwijage submitted that PW1's evidence that he could not sleep because of the noise pollution caused by the respondent was direct evidence of private nuisance**.**

Lastly, on the fifth and sixth grounds, the respondent failed to demonstrate their lawful permission as to why they established a church in a residential area neighbouring the appellant. Therefore, the weight of evidence was on direct testimonies from PW1 and PW2, respectively. The Appellant has met the required standard of proof so far, as the nature of the case and claims are concerned; thus, the magistrate should have found the oral evidence of PW1 and PW2 sufficient

On his part, Mr Rwebangila, for the respondent, submitted that the appellant, in the first place, was required to prove with concrete evidence that noise pollution emanated from the church. Failure to do so rendered the other complaints superfluous. He cited section 110 of the **Evidence Act, [Cap. 6 R.E 2019] and M, C. Sarkar, S.C. Sarkar and P.C. Sarkar m Sarkar's Law of Evidence, 18th Edition 2014 at page 1896** that the burden of proving a fact rest on the party who substantially asserts the affirmative of the issue.

He argued during the trial that neither the appellant nor her witness could establish with certainty that the purported noise was unlawful to the extent of exceeding the minimum standard set by the National Environmental Standards Committee. He cited the case of **Iddi Salum Babu versus Grace Sillo Wawa and Others Civil Appeal No. 79 Of 2016** to support his stance.

On the second ground citing **Habiba Ahmadi Nangulukuta & Others Vs Hassani Ausi Mchopa (the Administrator of the Estate of the late Hassan I Nalino) & Another** (supra) he argued the Appellant did not discharge the burden of proof upon him.

Concerning damages on the fourth ground, Mr Rwebangila submitted that damages awarded as an entitlement to a successful claimant in a suit must be pleaded, particularised, and strictly proved. He cited **Stanbic Bank Tanzania Ltd vs. Abercrombie & Kente (T) Limited, Civil Appeal No.21 of 2001 (CAT) (unreported),** where damages were not specifically pleaded, particularised, and proved.

The fifth and sixth grounds involve evaluating evidence. The appellant counsel's argument that the trial court failed to evaluate the evidence on record is a misconception. He argued that the appellant counsel needed to point out the evidence from PW1 or PW2 that the trial court said neglected its duty to evaluate.

In rejoinder, the appellant argued that this court should distinguish the case of **Habiba Ahmad Nangulukuta**. This case is distinguishable in facts and subject matter. The case cited involves ownership of land, and it differs from the one at hand on the tort of nuisance, specifically on ingredients.

Concerning proof of unreasonable noise, she referred to regulations 7 (1) and (2) of the **Environmental Management (Standards for the Control of Noise and Vibrations Pollution), G.N 32/2015.** She argued that this court should consider whether the unreasonable sound was proved regarding the time of day, proximity to the residential area, and proximity of noise.

On my part, I wish to start with the fifth ground: the trial court considered the appellant evidence but believed that the same was insufficient. With respect, it is one thing to consider the evidence of a part and another to be persuaded by the same as proving the alleged fact. In any case, as the first appellate Court, this court is bound to analyse the evidence for both sides to satisfy itself that the trial court's finding was justified on the evidence and may come up with its finding. The fifth ground fails but will also be remedied by revaluation.

On the first ground, it is not disputed that the respondent operated church services in the appellant's neighbourhood. The central issue, as deliberated by the trial court, was whether there was a nuisance occasioned in the first place. This court notes that not all louder sounds are annoying, and conversely, not all annoying sounds are louder; the concern in this appeal is the type of nuisance complained by the appellant. I say so because it is a trite law that parties are bound by their pleadings. At any standard, written submissions only elaborate on the facts and

evidence already indicated in the pleadings. See ***Luhumbo Investment Limited vs National Bank of Commerce Lited & Others (Civil Appeal 503 of 2020) [2022] TZCA 738 (23 November 2022).***

The appellant's claim, as pleaded in the trial court, is featured in paragraphs 6 and 7 of the appellant's plaint, complaining about noise pollution caused by louder music and vibration.

I am persuaded by the decision of this court in **Iddi Babu vs Grace Sillo Wawa & Others (Civil Appeal 79 of 2016) [2018] TZHC 2724 (10 July 2018)** Banzi J that noise emissions are regarded as noise pollution if they exceed the minimum standards set by the National Environmental Standards Committee established under the Environmental Management Act, No. 20 of 2004.

I have revisited the evidence on record; the appellant tendered evidence of his discomfort with the sound and the communication made to the 1st respondents. However, no evidence was tendered in the first place on the level of sound or noise from the said church. It was expected that the appellant would have tendered proof in the first place to prove that the noise from the church went beyond the regulated standard and contributed to a nuisance. With respect, a word of the plaintiff against that of the defendant would not suffice.

In the case of ***Sadhu Construction Company Limited v Peter E.M. Shayo [1984] TLR 127*** *the Court of Appeal stated that;*

> *"A nuisance to be actionable must be such as to be a real interference with the comfort or convenience of living according to the standard of the average man;* ***discomforts caused are not actionable if they fail to qualify as intolerable or unacceptable****; the discomforts must cause suffering to the party complaining". (emphasis supplied)*

While I take note of the appellant evidence of his discomfort with the sounds from the church, I do not subscribe to the appellant's counsel's view intimated in the second ground that proof of the fact of the existence of the church in a residential neighbourhood was in itself a proof of nuisance, with respect that was too general and may lead to an absurd decision.

While I address the second and third grounds, they are interrelated. The appellant stressed the respondent's lack of evidence regarding authorizing the church's operation in the area. In this appeal, the determinant ground was the first ground, which also was involved in the first issue in the trial is the existence or otherwise of nuisance; having found that the proof of this was wanting, I will thus say in passing and reminder that on a cardinal principle of law that, in civil cases, the burden of proof lies on the party who alleges anything in his favour. This is fortified by the provisions of sections 110 and 111 of the Evidence Act.

The appellant could not allege the respondent's wrongdoing and expected the respondent to prove it on his behalf.

The fourth ground on damages. It is the law that special damages should be pleaded and proved. This was not the case in the trial. The other type of damages that may be awarded are general. This is consequential, as rightly argued by Mr Rwebangila, the counsel for the respondent. In the cited case of Stanbic **Bank Tanzania Ltd vs. Abercrombie & Kente (T) Limited** supra the court of appeal at page 16 quoting See **Lord Blackburn in Livingstone v Rawyards Coal Co. (1850) 5 App. Cas. 25 at page 39.**

> *Damages, generally, are: - That sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been if he has not sustained the wrong for which he is now getting compensation or reparation.*

Since I have found that the wrong that is nuisance complained of was not proved, it goes without saying that the complaint of damage equally fails. I see no merit on the fourth ground.

All said I find that the district court correctly found that the appellant's claims were not proved. This appeal was brought without sufficient merit, and it equally fails. The respondent shall have the costs.

A J. KIREKIANO

JUDGE

8.7.2024.

COURT

Judgement was delivered in the presence of Mr Khalid Sudi Rwebangila for respondent also holding brief of Miss Demetria Mwijage for the appellant.

A J KIREKIANO

JUDGE

8.7.2024.