Safaricom PLC v Gikandi & another (Civil Appeal E1039 of 2022) [2024] KEHC 9892 (KLR) (30 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9892 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL APPEAL E1039 OF 2022

DKN MAGARE, J

JULY 30, 2024

BETWEEN

SAFARICOM PLC .... APPELLANT

AND

DUNCAN NDERITU GIKANDI .... 1ST RESPONDENT

THE HON. ATTORNEY GENERAL .... 2ND RESPONDENT

([Being an appeal from the Judgment of Hon. G. M. Gitonga (PM) in Nairobi CMCC No. 9883 of 2018, delivered on 23rd September, 2022)

JUDGMENT

1. This is an appeal from the decision of Hon. G.M. Gitonga (PM) given on 23/9/2022 in Nairobi CMCC 9883 of 2018. The Appellant was the 1st defendant in the court below.
2. The claim in the court below was that of malicious prosecution. Though joined as a party, the 2nd respondent was struck out as the claim against the state was time barred. There is no basis for them to be sued as second respondents in this matter.

Pleadings

3. The 1st respondent filed suit out of time claiming malicious prosecution. He got leave to file suit out of time to enable him file and prosecute his case. The reason he gave for not filing suit within time was that he could not access funds.
4. The 1st Respondent filed an affidavit dated 14/9/2018 stating that he was acquitted on 15/6/2015. The application was filed on 15/9/2018, 3 years and 3 months after acquittal. The court granted leave to file out of time on 2/10/2018.

5. The 1st Respondent filed suit on 7/11/2018. This was 1 month and 5 days after getting leave. He claimed for malicious prosecution against the 2nd Respondent and the Appellant. The 1st Respondent alleged to have incurred a sum of Kshs. 100,000/= as fees for prosecuting the case, yet he could not raise 2,000/=, within one year. This is the same fees he could not afford to file suit, yet he could afford 100,000/= in a short span to defend himself.

6. The 1st Respondent had been charged on 13/3/2012 for stealing contrary to section 275 of the Penal Code. He was charged with one Benson Mbugua Gakumo for stealing Kshs. 1,010,782/= between 17/9/2010 and 31/12/2010. The matter went to court on 14/2/2011 where the 1st Respondent pleaded not guilty.

7. The 1st Respondent was acquitted under section 202 CPC on 16/2/2015. Ipso facto, the suit became time barred by 15/2/2018.

8. The Appellant filed 15 grounds of appeal. The same is prolixious, unseemly, and repetitive. The grounds are unworthy to be repeated verbatim. They raise only 3 issues:-

    a. Whether leave to file suit out of time for a case of malicious prosecution was properly granted in CMCC 9883 of 2018.

    b. Whether malicious prosecution was available with acquittal under Section 202 of the CPC.

    c. Whether the court misdirected itself in awarding General damages of Kshs. 1,500,000/= and 100,000/= as special damages.

Analysis

9. The appeal as filed is wordy and contrary to good tenets of pleadings as set out in Order 42 Rule 1 of the Civil Procedure Rules as doth: -

> " 1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.
>
> (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.

10. The Court of Appeal had this to say about compliance with Rule 86 of the Court of Appeal Rules (which is pari materia with Order 42 Rule 1 of the Civil Procedure Rules) in the case of Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] eKLR:

> " We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules

of the Court. (See Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others [2013] eKLR) and Nasri Ibrahim v. IEBC & 2 Others [2018] eKLR. In the latter case, this Court lamented:

> "We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric…A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs." The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues…"

11. In the case of Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] eKLR, the court of appeal observed that : -

> " Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the *Kenya Ports Authority Act* ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In *William Koross V. Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No. 223 of 2013*, this Court stated:
>
> > "The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better."

12. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

13. In the case of Mbogo and Another vs. Shah [1968] EA 93 the court stated:

> " …that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

14. The duty of the first appellate court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968]EA 123, where the law looks in their usual gusto, held by as follows;-

> " .. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court … is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

15. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

16. In the case of Peters vs Sunday Post Limited [1958] EA 424, court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses…But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion…"

17. In Nyambati Nyaswabu Erick Vs Toyota Kenya Ltd & 2 Others (2019) eKLR, Justice D.S Majanja held as doth:

> " General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same."

18. The duty of the court regarding damages is settled that the state of the Kenya economy and the people generally and the welfare of the insured and injury public must be at the back of the mind of the trial Court.

19. The foregoing was settled in the cases of Butter Vs Butter Civil Appeal No. 43 of 1983 (1984) KLR where the Court of Appeal held as follows at paragraph *8*.

> " In awarding damages, a Court should consider the general picture of all prevailing circumstance and effect of the injuries of the claimant but some degree of uniformity is to be sought in the awards, so regard would be paid to recent awards in comparable cases in local Courts. The fall of value of monies generally, the levelling up and down of the facts of exchange between currencies…should be taken into consideration."

20. Finally, in deciding whether to disturb quantum given by the Lower Court, the Court should be aware of its limits. Being exercise of discretion the exercise should be done judiciously conclusively are circumstances to ensure that the award is not too high or too low as to be an erroneous estimate of damages.

21. The court of appeal, pronounced itself succinctly on these principles in Kemfro Africa Ltd Vs Meru Express Servcie Vs. A.M Lubia & Another 1957 KLR 27 as follows: -

> " The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages.

22. The foregoing statement had been ably elucidated by Sir Kenneth 'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Counsel, that is Nance vs British Columbia

Electric Co Ltd, in the decision of Henry Hilanga vs Manyoka 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

> " The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance..."

23. Therefore, for me to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure.

24. So my duty as the appellate court is threefold regarding quantum of damages: -

    a. To ascertain whether the court applied irrelevant factors or left out relevant factors.

    b. To ascertain whether the award is too high as to amount to an erroneous assessment of damages.

    c. The award is simply not justified from evidence.

25. An application was filed under Section 27 of the *Limitation of Actions Act*. The said Section states as follows:

> " Extension of limitation period in case of ignorance of material facts in actions for negligence, etc.
>
> (1) Section 4(2) does not afford a defence to an action founded on tort where-
>
> a. the action is for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law); and
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> b. the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person; and the court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and the requirements of subsection (2) are fulfilled in relation to the cause of action.
>
> (2) The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which-
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> a. either was after the three-year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period; and
>
> b. in either case, was a date not earlier than one year before the date on which the action was brought.
>
> (3) This section does not exclude or otherwise affect-
>
> (a) any defence which, in an action to which this section applies, may be available by virtue of any written law other than section

4(2) of this Act (whether it is a written law imposing a period of limitation or not) or by virtue of any rule of law or equity; or

(b) the operation of any law which, apart from this section, would enable such an action to be brought after the end of the period of three years from the date on which the cause of action accrued.

26. Section 27 and section 28 of the *Limitation of Actions Act* is limited to negligence. It does not cover other torts. There is no provision in law for the extension of time for malicious prosecution. The question is whether there can be extension of time for malicious prosecution. Two ingredients are required to extend time in negligence:

a. Ignorance of material facts.

b. The limitation thereof is after 3 years.

c. It is a claim in negligence.

27. A claim for malicious prosecution falls outside that period. The facts relating to malicious prosecution cannot be outside the knowledge of the 1st Respondent. There were no facts of decisive character that were raised. Lack of money does not fall within the requirement of extension of time.

28. Consequently, there can never be extension of time for malicious prosecution or even contract. This is because all parties are known in advance. Extension of time is limited to the tort of negligence.

29. In the case of Omari Ismael Mazzha v Office of the Director of Public Prosecution (ODPP) & another [2021] eKLR, the court stated that: -

" 8. To qualify for extension of time within which to file suit for actions founded on tort, the claim should be for damages for negligence, nuisance, breach of duty and in respect of personal injuries. As espoused by the Court of Appeal in Mary Osundwa Vs. Nzoia Sugar Company Ltd;

"This section clearly lays down the circumstances in which the court, would have jurisdiction to extend time. The action must be founded on tort and must relate to the torts and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed are in respect of personal injuries to the Plaintiff as a result of the tort. The section does not give jurisdiction to the court to extend time for filing suit in cases involving contract or any other causes of action other than those in tort."

(See for example the Court of Appeal decisions in Willis Ondili Odhiambo Vs. Gateway Insurance Co. Ltd [2014] eKLR)

30. In the case of Charles Ntiritu M'ikunyua v Judith Njue & 2 others [2016] eKLR, F. Gikonyo J stated as follows:

" An application for leave to file suit for malicious prosecution, the Applicant must contend with the provisions of *Public Authorities Limitation Act*. He must show that:

(1) he was prevented from bringing the suit for tort within the time prescribed in section 3 of cap 39 for he was under a disability; and

(2) when he ceased being under disability. He will also have to show material facts relating to the cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the Applicant until a date which was beyond the prescribed time. The Applicant's conviction and sentence was quashed on 8th May 2014- at the time, the Applicant had already served his jail term. Since that date, he next woke up from slumber on 30th December 2015 when he filed this application. Considerable amount of time; over 18 months passed by without any action being taken. The Applicant tried to explain this delay by stating that it was caused by his legal counsel's failure to effect his instructions. This is not plausible explanation as I note that the advocates issued a notice of intention to sue the AG dated 14th December 2014 but there is nothing to show the follow-up action taken by the Applicant in the matter yet he was already out of prison. In any case, these kinds of arguments are best utilized in a case of negligence against the legal counsel rather than in an application for extension of time which requires specific matters to be proved by the applicant. Such omission is not in itself or solely to be regarded as a material fact for which extension of time to file suit shall be granted. Therefore, the Applicant has not satisfied either section 3 of the Public Authorities Act or sections 27 or 28 of the law of *Limitation of Actions Act*. This statement brings ne to the point where I should say something about the submission by Mr Kiongo that by dint of section 42(1) (e) of Cap 22, *Limitation of Actions Act* does not apply in proceedings

governed by cap 39."

31. In the case of Peter Gichuki Mwangi Vs. Kenya Copyright Board & 3 others [2018] eKLR J .A. Makau held as follows: -

> "In the instant application, the Applicant's claim would be seeking damages for malicious prosecution for which Section 27 and 28 of the *Limitation of Actions Act* (Cap 22) Laws of Kenya, a claim for damages based on malicious prosecution is not included. The extension of time is limited to the nature of claims for damages limited under Section 27 of the Limitation of Action Act and no other. This court cannot act beyond the express provisions of the law and extend the period of filing suit out of time for which the law do not allow or where the requirements which are specifically set out have not been satisfied."

32. The next issue is the length of time within which to file malicious prosecution. The main party in the malicious prosecution case is the state. To bring any action against the state, it has to be brought within 1 year. If the case against the state falls, it does not survive for the other parties – that is the complainant and other significant parties who may be sued. Therefore, in a more fundamental way, there can be no public prosecution without the office of the ODPP and the IG. The two bodies have their limitation cast in stone by dint of Section 3(1) of the *Public Authorities Limitation Act*, Cap. 39. The section provides as follows: -

> "(1) No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued."

33. Consequently, if the suit was time barred against the AG and ODPP, it cannot be valid against the complainant. This alone is enough to dispose the appeal.

34. However, there is a second limb. I was shocked to note that the court failed to honour time held precedent that an ex-parte order cannot remain unchallenged. The court was plainly wrong in holding that it lacked jurisdiction to look at the question of extension of time. The correct fact is that the court cannot review the order granting leave. The order is to be challenged during the hearing. It is not even just the challenge, the holder of the order for leave must prove at the full hearing that the order was satisfied.

35. In this case the court was plainly wrong. The facts show that there was no basis for extension of time. In the circumstances, the judgment was entered in vacuo. There were no facts justifying the finding.

36. I agreed with the case of John Gachanja Mundia v Francis Muriira & Another [2017] eKLR, where Mabeya J stated as follows:-

> "The long thread of cases on this subject from Cozens v. North Devon Hospital Management Committee and Anor [1966] 2 ALL ER 799 to Yunes K. Oruta v. Samuel Mose Nyamato [1988] KLR 490 establish that, an objection regarding the granting of leave to file suit out of time can only be raised at the hearing of the suit. That objection was raised by the appellant and the incidence of proof shifted to the 1st respondent to show that he was deserving the leave he had been granted.
>
> 26. The view this Court takes is that, a Defendant can only challenge the leave at the trial by way of cross-examination on the circumstances of late filing of the case. It is only after he successfully mounts such a challenge that the incidence of proof shifts back to the Plaintiff to defend the leave obtained exparte. This happened in the present case but the 1st respondent failed to discharge that burden."

37. The mere fact that a complainant made a complaint is not enough to show malice. The court unfairly attributed the 4-year delay to the complaint. The delay was caused by the court, not the parties. The delay is not evidence of malice. The 1st Respondent did not prove malice. The Appellant never did any other action other than report. They did not even supply documents. The problem was not with the Appellant but with the investigators for not getting the documents and bonding witnesses.

38. There can be no post facto malice. The fact of 4-year delay cannot be attributed back to the complainant. In effect the claim against Appellant was time barred and unmerited. The Appeal is thus allowed.

39. On general damages the court plucked a figure from the air. It has no grounding. The 1st Respondent was arrested on 13/3/2011 and released on bond. He was in lawful custody. It is not a ground. In any case, the Appellant does not have facts.

40. The claim against the parties is untenable. Had the claim been found tenable, a sum of 50,000/= nominal damages could have sufficed. It is unnecessary to address special damages. Justice Patrick J.O. Otieno stated as follows: -

> "It is thus not the law that no general damages are ever awardable where a clear breach is established. My appreciation of the law is that every time there is a breach of a contract, the innocent party is, from the onset, entitled to nominal damages but will also get general

damages where he proves an injury flowing as a natural consequence from the breach. I find this to be the congruent position in both text books and stare decisis. The author of The Halsbury's Laws of England, Third Edition vol. II, takes the position that: -"where a plaintiff whose rights have been infringed has not in fact sustained any actual damage therefrom, or fails to prove that he has; or although the plaintiff has sustained actual damage, the damage arises not from the defendant's wrongful act, but from the conduct of the plaintiff himself; or the plaintiff is not concerned to raise the question of actual loss, but brings his action simply with the view of establishing his right, the damages which he is entitled to receive are called nominal. Thus in actions for breach of contract nominal damages are recoverable although no actual damage can be proved."

41. In Kinakie Co-operative Society v Green Hotel (1988) KLR 242, the Court of Appeal while taking the position that damages are indeed awardable for breach of contract in deserving cases held: -

> " where damages are at large and cannot be quantified, the court may have to assess damages upon some conventional yardstick. But if a specific loss is to be compensated and the party was given a chance to prove the loss and did not, he cannot have more than nominal damages."

Determination

42. The upshot of the foregoing is that I make the following orders: -

a. The appeal is allowed. The Judgment in the court below is set aside. In lieu thereof I find that there was no basis for extension of time. The suit is equally unmerited. The suit in the court below is dismissed with costs.

b. The Appellant shall have costs of Ksh. 65,000/= payable by the 1st Respondent.

c. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 30TH DAY OF JULY, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

IN THE PRESENCE OF:-

No appearance for parties

Court Assistant – Jedidah