Wainaina v Inspector General of Police & 3 others (Civil Suit E068 of 2021)
[2024] KEHC 16140 (KLR) (Civ) (20 December 2024) (Ruling)

Neutral citation: [2024] KEHC 16140 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT E068 OF 2021

CW MEOLI, J

DECEMBER 20, 2024

BETWEEN

JUNGHAE WAINAINA ..... PLAINTIFF

AND

THE INSPECTOR GENERAL OF POLICE ..... 1ST DEFENDANT

ETHICS & ANTI-CORRUPTION COMMISSION ..... 2ND DEFENDANT

THE DIRECTOR OF PUBLIC PROSECUTIONS ..... 3RD DEFENDANT

THE ATTORNEY GENERAL ..... 4TH DEFENDANT

RULING

1. The background to the motion dated 14.11.2023 is that the Plaintiff herein, Junghae Wainaina (hereafter the Respondent) sued The Inspector General of Police (the 1st Defendant), the Ethics & Anti-Corruption Commission, the 2nd Defendant (and hereafter the Applicant), The Director of Public Prosecution (the 3rd Defendant) and The Attorney General, (the 4th Defendant) seeking damages for malicious prosecution. The Applicant thereafter filed a statement of defence denying the key averments in the plaint and later by its motion dated 14.11.2023 sought to have the suit herein struck out with costs for being brought prematurely.

2. The motion is inter alia expressed to be brought under Section 1A, 1B & 3A of the *Civil Procedure Act* (CPA) and Order 51 Rule 1 of the Civil Procedure Rules (CPR). And is premised on grounds on the face of the motion and as amplified in the supporting affidavit sworn by Pius Nyoike, who describes himself as an Advocate of the High Court of Kenya, having conduct of the matter on behalf of the Applicant, therefore duly authorized and competent to swear the affidavit.

3. The gist of his deposition is that the Applicant having conducted investigations recommended criminal charges against the Respondent jointly with three (3) others in Chief Magistrates Court Nairobi, Anti-Corruption Case No. 4 of 2012 – Republic v Amos Kimunya & 3 Others. That following trial the Respondent and his co-accused were acquitted on 20.05.2020 in Anti-Corruption Case No. 4 of 2012; that the said acquittal was challenged by way of an appeal, namely, Nairobi High Court, Anti-Corruption & Economic Crimes Appeal No. 6 of 2020; and that pursuant to judgment delivered in Anti-Corruption & Economic Crimes Appeal No. 6 of 2020 on 06.10.2022, the appeal was allowed, the appellate court directing that the Respondent be placed on his defence before the trial court.

4. He further asserted that the Respondent filed a Notice of Appeal dated 13.10.2022 to the Court of Appeal from the judgment of the High Court and contemporaneously filed before the same Court an application seeking to stay the proceedings in Anti-Corruption Case No. 4 of 2012 and that on 09.06.2023 the Court of Appeal delivered a ruling staying the High Court decision and directing that the Respondent does file his appeal within sixty (60) days. Hence, it is evident that the criminal proceedings are yet to terminate paving way for the Plaintiff to pursue a claim of malicious prosecution, and that the current suit is premature having been filed before termination of the criminal proceedings.

5. The Respondent opposes the motion by way of a replying affidavit dated 24.06.2024. He confirms the events leading up to the Court of Appeal ruling delivered on 09.06.2023. He goes on to depose that the Applicant's motion is fundamentally predicated on the existence and enforceability of the order setting aside his acquittal. Whereas the Court of Appeal ruling halted any proceedings premised on the order setting aside the acquittal, hence proceedings seeking to have the suit struck out. He contends that the Court of Appeal order deprives this Court of jurisdiction on account of the principle of stare decisis, and therefore the Applicant's motion ought to be dismissed.

6. The 1st, 3rd & 4th Defendant did not participate in the instant proceedings.

7. The motion was canvassed by way of written submissions. Counsel for the Applicant first restated the events leading to the instant motion. He anchored his submissions on the decisions in Kenya Power & Lighting Company Ltd v Edward Aliela Musambai & Attorney General [2022] KEHC 1497 (KLR) and Wambua v Mbuthi & 2 Others [2022] KECA (KLR) to submit that the four ingredients of malicious prosecution must not only be present but are also composite. Stating that the present motion concerns a situation where prosecution has yet to terminate in favour of the Respondent. Therefore, in answering the question whether prosecution had terminated in favour of the Respondent at institution of the instant suit, counsel argued that the suit was filed in 2021 during the pendency of an appeal at the High Court following the acquittal of the Plaintiff. That presently, the prosecution is yet to terminate as demonstrated in the affidavit material in support and opposition of the motion.

8. Counsel therefore posited that the suit is speculative if not an abuse of the Court process. That the Respondent's suit as filed would present a situation where malicious prosecution suits proceeds at cross purposes with criminal proceedings and hence likely conflict, where for instance an acquittal is overturned. It was further submitted that where a prosecution has yet to terminate, a suit for malicious prosecution cannot be allowed to subsist or remain in abeyance pending the outcome of the criminal proceedings. The Court was urged to strike out the suit with costs.

9. Counsel for the Respondent, in addressing the question whether the suit has been prematurely filed, submitted that the Respondent was acquitted on 20.05.2020. Following which he filed this suit was filed, while the Respondent had proceeded to appeal the acquittal. And that the High Court judgment was delivered in 2022, way after the filing of the suit and that in between, nothing prevented the Respondent from filing the suit or any other proceedings pertaining to the criminal case during the pendency of the High Court appeal. It was further asserted that based on the stay orders by the Court

of Appeal, the status quo following the Respondent's acquittal holds. Counsel reiterated that the Applicant cannot seek to enforce the High Court decision in light of the Court of Appeal orders.

10. On the question whether the suit ought to be struck out, counsel relied on the provisions of Order 2 Rule 15 of the CPR, and two authorities, namely, Kamara v Galana Oil Kenya Ltd [2023] KEHC 21537 (KLR) and D.T. Dobie & Company Limited v Joseph Mbaria Muchina & Another [1980] eKLR. To contend that the motion has not met the requisite threshold, the settled principle being that striking out of suits is a draconian measure which should only be allowed where the Court is persuaded that the suit is hopelessly defective and incurable in law. Counsel disputing that such evidence has been presented here by the Applicant. And further contending that the Court of Appeal orders are conservatory in nature, he proposed that the only order appropriate here is holding this suit in abeyance pending the final decision of the Court of Appeal. The Court was urged to dismiss the Applicant's motion with costs.

11. The Court has considered the material canvassed in respect of the motion. The key question falling for determination is whether the Court ought to strike out the suit for being prematurely filed. The motion is predominantly anchored on Section 3A of the CPA, which reserves the inherent power of the court "to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the court". The purport of the latter provision was addressed by the Court of Appeal in Rose Njoki King'au & Another v Shaba Trustees Limited & Another [2018] eKLR.

12. Ordinarily, applications seeking the striking out of pleadings are premised on the provisions of Order 2 Rule 15 of the CPR, which provides that;-

    (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

        (a) it discloses no reasonable cause of action or defence in law; or

        (b) it is scandalous, frivolous or vexatious; or

        (c) it may prejudice, embarrass or delay the fair trial of the action; or

        (d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

    (2) No evidence shall be admissible on an application under sub rule (1)(a) but the application shall state concisely the grounds on which it is made.

    (3) So far as applicable this rule shall apply to an originating summons and a petition.

13. As rightly submitted by the Respondent, the principles governing applications for striking out of pleadings were spelt out by Madan JA (as he then was) in D.T. Dobie & Company (Kenya) Limited (supra). The Court stated therein that: -

> "A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a lawsuit is for pursuing it.
>
> No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it."

14. These principles have held sway in subsequent years and have been applied consistently in our jurisdiction. In Kivanga Estates v National Bank of Kenya Limited [2017] eKLR, for instance, the Court of Appeal echoing the dicta in D.T Dobie (supra) stated; -

> "It is not for nothing that the jurisdiction of the court to strike out pleadings has been described variously as draconian, drastic, discretionary, a guillotine process, summary and an order of last resort. It is a powerful jurisdiction capable of bringing a suit to an end before it has even been heard on merit. Yet a party to civil litigation is not to be deprived lightly of his right to have his suit determined in a full trial. The rules of natural justice require that the court must not drive away any litigant from the seat of justice, without a hearing, however weak his or her case may be. The flip side is that it is also unfair to drag a person to the seat of justice when the case against him is clearly a non-starter. The exercise of the power to strike out pleadings must balance these two rival considerations ... Striking out a pleading though draconian, the Court will in its discretion resort to it, where, for instance the court is satisfied that the pleading has been brought in abuse of its process or where, it is found to be scandalous, frivolous and vexatious".
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> See also: - Crescent Construction Co. Ltd v. Delphis Bank Ltd [2007] eKLR

15. At the outset it must be stated that the law does not expressly contemplate the striking out of a suit for being prematurely filed, save where for instance there is no reasonable cause of action arising from such premature filing. Order 2 Rule 15 of the CPR as interpreted in the above cited decisions sets out the parameters for the striking out of a suit. Here, the Respondent's suit is founded on the cause of malicious prosecution. The elements to be proved in an action for malicious prosecution are well settled since Mbowa v. East Mengo District Administration [1972] EA 352, where the East African Court of Appeal summarized the law as follows: -

> "The action for damages for malicious prosecution is part of the common law of England...The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. The purpose of the prosecution should be personal and spite rather than for the public benefit. It occurs as a result of the abuse of the minds of judicial authorities whose responsibility is to administer criminal justice. It suggests the existence of malice and the distortion of the truth. Its essential ingredients are:
>
> 1) the criminal proceedings must have been instituted by the defendant, that is, he was instrumental in setting the law in motion against the plaintiff and it suffices if he lays an information before a judicial authority who then issues a warrant for the arrest of the plaintiff or a person arrests the plaintiff and takes him before a judicial authority;
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> 2) the defendant must have acted without reasonable or probable cause i.e. there must have been no facts, which on reasonable grounds, the defendant genuinely thought that the criminal proceedings were justified;
>
> 3) the defendant must have acted maliciously. In other words, the defendant must have acted, in instituting criminal proceedings, with an improper and wrongful motive, that is, he must have had, "an intent to use legal process in question for some other than its legally appointed and appropriate purpose" Pike v. Waldrum [1952] 1 Lloyd's Rep. 431 at p. 452; and

4) the criminal proceedings must have been 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..."

See also Murunga v Attorney General [1979] KLR 138

16. As rightly argued by the Applicant, it is settled that all the ingredients outlined in Mbowa (supra) must be conjunctively established for a claimant to succeed in a cause founded on malicious prosecution. Here, the Applicant contends that the suit is premature on grounds that the prosecution process is yet to terminate in favour of the Respondent and that the suit equally ought not to be allowed to remain in abeyance pending the outcome of the criminal proceedings. The Respondent's riposte is that his suit was filed before the High Court decision and that, pursuant to the stay orders by the Court of Appeal, the status quo following the Respondent's acquittal subsists. And further contends that the motion has not met the threshold to set out in Order 2 Rule 15 of the CPR and decision in D.T Dobie (supra).

17. In determining the motion, the Court is called upon to determine the question whether the criminal proceedings have terminated in favour of the Respondent. It is undisputed that the Respondent alongside other accused persons were acquitted, apparently, under section 210 of the Criminal Procedure Code (CPC) on 20.05.2020 by the Magistrates Court before which the criminal trial had proceeded. However, being aggrieved with the acquittal decision, the Applicant lodged a petition of appeal dated 05.06.2020 before the High Court see (see annexure marked RS1).

18. Notably, the present suit was filed in 2021, after the Applicant had mounted a challenge before the High Court in respect of criminal proceedings that had terminated in favour of the Respondent. But before the judgment of the High Court. Notwithstanding, the termination of criminal proceedings in favour of the Respondent before the Magistrates Court, upon the Applicant lodging an appeal in respect of the said decision, the criminal proceedings were still live and ongoing before the High Court. Eventually, the High Court in allowing the Applicant's appeal directed that the Respondent be placed on his defence before the trial Court. Indeed, the appeal process could well go all the way to the Supreme Court and back to the subordinate court.

19. A disputed issue here is whether the fact of the Respondent's pending appeal against the High Court decision and the Court of Appeal's temporary order (see annexure marked RS2) staying the High Court decision, effectively render the criminal proceedings terminated in favour of the Respondent. I do not think so. Thus, it would be an absurdity for this Court to proceed to hear and determine or even retain the suit as currently framed. What would happen if the appeal before the Court of Appeal was unsuccessful, and the trial Court convicted the Respondent upon being placed on his defence and a new challenge was filed in the High Court? Or if he was acquitted again by the trial court after his defence, only for a new challenge to be mounted before a higher court.

20. Never mind that the factual basis of the suit would have significantly changed in any event, even if the Court of Appeal found in his favour in the present appeal. Holding the suit in abeyance in such a dynamic scenario that would certainly involve considerable delays would have served no real purpose. It would be imprudent to do so, whereas nothing would bar the Respondent, if he eventually emerges successful upon the process being exhausted, from filing his suit for malicious prosecution.

21. Thus, as matters stand at this moment, the suit appears anticipatory and or speculative as asserted by the Applicant, as it cannot be positively stated at this moment that the criminal proceedings have terminated in favour of the Respondent, or at all. His invocation of the principle of stare decisis or assertion that a status quo currently obtains herein pursuant to the stay order of the Court of Appeal appear misplaced. Because, as of 05.06.2020 and prior to filing of the suit, the Respondent was aware

that despite his acquittal by the trial Court, the matter was not settled due to a challenge that had been mounted in the High Court. Therefore, putting to doubt an ingredient fundamental to the success of his suit.

22. The Court earlier observed that the settled ingredients of malicious prosecution spelt out in Mbowa (supra) are conjunctive, and a determination that the criminal proceedings have yet to terminate in favour of the Respondent, would effectively defeat his suit. Therefore, applying the dicta in Kivanga Estates (supra) it is this Court's considered view that the suit as it stands at this moment is hopeless and may not be redeemed by any amendment. Besides, given the timing of the filing of the suit in the chain of events outlined, and the Respondent's insistence on holding it in abeyance, one is tempted to conclude that there is an appearance of abuse of the process of the court. The circumstances obtaining upon his acquittal having changed, the Respondent cannot be allowed to hold the court in a hamstring as he pursues what essentially could be a series of proceedings before other courts; at present his acquittal stands as reversed by the High Court, until otherwise held by the Court of Appeal.

23. A party should not appear to play a game of roulette with court proceedings which take up the court's time resource, and with apparent scant regard for the overriding objective in section 1A and 1B of the CPA. About which the Court of Appeal stated in Karuturi Networks Ltd & Anor v Daly & Figgis Advocates, Civil Appl. NAI. 293/09 that:

> " The jurisdiction of this Court has been enhanced and its latitude expanded in order for the Court to drive the civil process and to hold firmly the steering wheel of the process in order to attain the overriding objective.... and its principal aims. In our view, dealing with a case justly includes inter alia reducing delay, and costs expenses at the same time acting expeditiously and fairly. To operationalize or implement the overriding objective, in our view, calls for new thinking and innovation and actively managing the cases before the court."

24. Thus, invoking the court's inherent power pursuant to Section 3A of the CPA as espoused in Rose Njoki King'au & Another (supra), the Court will proceed to strike out the Respondent's suit for being an abuse of the Court process, but with no orders as to costs.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 20TH DAY OF DECEMBER 2024.

C. MEOLI

JUDGE

In the presence of

Ms Nini for the Applicant

N/A for the Respondent

C/A: Erick