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Wachira v Kenya Tea Development Agency (K.T.D.A) & 3 others (Civil Appeal 103 of 2021) [2023] KEHC 22139 (KLR) (25 August 2023) (Judgment)

Neutral citation: [2023] KEHC 22139 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 103 OF 2021

OA SEWE, J

AUGUST 25, 2023

BETWEEN

JAMES KAMAU WACHIRA .... APPELLANT

AND

KENYA TEA DEVELOPMENT AGENCY (K.T.D.A) .... 1ST RESPONDENT

ATTORNEY GENERAL .... 2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS .... 3RD RESPONDENT

CHAI TRADING COMPANY LIMITED .... 4TH RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. G. Kiage, Senior Resident Magistrate, delivered on 9th July 2021 in Mombasa CMCC No. 1340 of 2019)

JUDGMENT

(1) The appellant herein, James Kamau Wachira, was the plaintiff in Mombasa Chief Magistrate's Civil Case No. 1340 of 2019: James Kamau Wachira v Kenya Tea Development Agency (KTDA) and 3 Others. He had sued the 4 respondents before the lower court claiming general damages for false and wrongful arrest and malicious prosecution as well as special damages of Kshs. 3,789,000/= together with costs of the suit.

(2) The appellant's cause of action was that, on or about the 11th May 2015, police officers from Changamwe Police Station, acting or purporting to act in the course of their duties, unlawfully and forcefully broke into his go-down in Saba Saba area and took away 181 bags of tea leaves on allegations that the same belonged to the 4th respondent and had been stolen from leased premises in Miritini owned by the 1st respondent. He consequently presented himself at Changamwe Police Station with receipts to back up his claim to ownership of the 181 bags of tea; but the police ignored his explanation. He was instead arraigned before the Chief Magistrate's Court on 7th July 2015 on a charge of breaking

into a building and committing a felony contrary to Section 306(a) of the Penal Code, Chapter 63 of the Laws of Kenya, as well as an alternative charge of handling stolen property contrary to Section 322(1) of the Penal Code. He added that he pleaded not guilty and, after a trial, was acquitted on 16th August 2018.

(3) At paragraph 11 of the Plaint, the appellant had averred that, under the common law and the doctrine of social contract, the respondents were under a legal duty to protect his right to freedom; which they breached by prosecuting him maliciously. He supplied the particulars of malice as well as particulars of special damage at paragraphs 11 and 12 of the Plaint and accordingly sought for damages for his wrongful arrest and malicious prosecution together with special damages in the sum of Kshs. 3,789,000/= and costs of the suit.

(4) The claim was resisted by the respondents. The 1st and 4th respondents adopted a similar line of defence as per their Statements of Defence filed on 11th September 2019 by M/s Munyao, Muthama & Kashindi Advocates. They contended that on the morning of 4th May 2015 during the opening of the 4th respondent's warehouse at Miritini, one of the company's agents/employees noticed that something was amiss with the padlocks; and that on gaining entry, it was established that 792 packages of tea had been stolen. The matter was promptly reported to Changamwe Police Station after which investigations were carried out by the police as required by the law. They therefore asserted that they could not have influenced the charging and prosecution of the appellant as their sole responsibility was limited to reporting the offence to the relevant authorities for appropriate action. They accordingly prayed for the dismissal of the appellant's suit with costs.

(5) On behalf of the 2nd and 3rd respondents, a joint Defence was filed before the lower court on the 29th August 2019. They thereby denied that the appellant was arrested and maliciously prosecuted as alleged by him or that he was entitled to general or special damages as set out in his Amended Plaint. Thus, the 2nd and 3rd respondents prayed for the dismissal of the appellant's suit with costs.

(6) Upon hearing the parties, Hon, Kiage, SRM, was of the view that the appellant had failed to prove the essential elements of his claim. Accordingly, the learned magistrate held:

> "...The plaintiff has not shown a nexus between the 1st and 4th defendants conduct and the decision of the police to arrest and prosecute him. The 1st and 4th defendants did not suggest to the police that it was the plaintiff that was responsible for the theft or lead them to his premises. I do find that the defendants, in setting in motion the prosecution, had no malicious intent against the plaintiff, and there clearly existed reasonable and probable cause for setting the same in motion.
>
> The 2nd and 3rd defendants having carried out investigations based on the report by the 1st and 4th defendant which report I have found was based on a reasonable and probable cause cannot therefore be faulted for simply executing their legal mandate...The upshot of the foregoing is that the plaintiff has failed to make out a case to sustain any of the reliefs sought and consequently the case is dismissed with costs to the defendants."

(7) Being aggrieved by the decision of the lower court, the appellant lodged this appeal on 28th July 2021. He relied on the following grounds:

(a) That the Learned Magistrate erred in fact and in law in failing to appreciate the settled principles of the tort of malicious prosecution.

(b) That the Learned Magistrate erred in law and fact in giving effect to technicalities without due regard to substantive justice.

(c) That the Learned Magistrate erred in law and fact in raising points for determination which were neither raised in the pleadings of the respondents nor canvassed in their respective submissions.

(d) That the Learned Magistrate erred in law and fact in failing to analyse the evidence adduced by the parties.

(e) That the Learned Magistrate erred in law and fact in failing to quantify the claim under the law.

(f) That the Learned Magistrate erred in fact and in law in failing to award special damages that were specifically pleaded and proved.

(g) That the Learned Magistrate erred in both law and fact by failing to appreciate the appellant's written submissions.

(8) In the premises, the appellant prayed that his appeal be allowed with costs and that the judgment of the lower court be set aside.

(9) The appeal was canvassed by way of written submissions pursuant to the directions given herein on 4th May 2022. On behalf of the appellant, written submissions were filed on 4th August 2022 by Ms. Kariuki, duly instructed by M/s Wanjugu-Waweru & Associates. Counsel argued the appeal on two main grounds, namely, that the learned magistrate failed to appreciate and properly analyse the evidence and submissions placed before him in the light of the settled principles relative to the tort of malicious prosecution. She accordingly combined grounds [1], [4] and [7] together. Counsel likewise collapsed and then Grounds [2], [3] and [6] and submitted that the lower court resorted to technicalities at the expense of substance and thereby delved into points that were not raised by the parties in their pleadings or submissions.

(10) Ms. Kariuki relied on Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2004] eKLR as to the duty of an appellate court. She also quoted extensively from Chrispine Otieno Caleb v Attorney General [2014] eKLR and Stephen Gachau Githaiga & Another v Attorney General [2015] eKLR to augment her submissions on the essential elements of the tort of malicious prosecution.

(11) Hence, it was the submission of the appellant that, the mere fact that a complaint is lodged does not, of itself, justify the institution of a criminal prosecution; and that law enforcement agencies are under duty to investigate a complaint before preferring a charge against a suspect. Counsel relied on James Karuga Kiiru v Joseph Mwamburi & Others [2001] eKLR and G.B.M Kariuki v Attorney General [2016] eKLR and urged to find that all the elements of the tort of malicious prosecution had been proved to the requisite standard before the lower court.

(12) Ms. Kariuki took issue with the fact that the learned magistrate raised suo motu the issue of separate legal capacity of Kasuku Tea Packers Limited. She relied on Teenwise Media Limited v Kenatco Taxis Limited & Another [2016] eKLR to support the argument that parties are bound by their pleadings and that a trial court is under obligation to decide a case on the basis of the pleadings and evidence placed before it. Counsel submitted that the charges were preferred against the appellant in his capacity as a director of Kasuku Tea Packers Ltd; and therefore Grounds 2, 3 and 6 of the Grounds of appeal ought to be sustained.

(13) In respect of Grounds 5 and 7 of the appellant's Memorandum of Appeal, counsel submitted that, had the learned magistrate put the appellant's submissions into consideration, he would have made a different finding. In particular, counsel pointed out that it is trite that the court must assess the damages it would have awarded even where a suit is dismissed. He relied on Stephen Gachau Githaiga (supra)

in support of this argument as well as the submissions made before the lower court on the aspect of quantum of damages. He submitted that, by virtue of his malicious prosecution by the respondents, the appellant suffered injury to his dignity, reputation and feelings. In this regard, he complained that, other than the risk of imprisonment, the appellant's trial took an agonizing three years.

(14) In addition to the foregoing, the appellant submitted that the special damage component of his claim was properly pleaded and proved in the sum of Kshs. 3,789,000/=, being the value of the tea leaves that were destroyed after the illegal confiscation by the police. Hence, the Court was urged to find that the appellant had proved his case on a balance of probabilities as required by law; and therefore that judgment ought to be given in his favour for the sum of Kshs. 1,500,000/= as general damages and the sum of Kshs. 3,789,000/= for special damages plus costs and interest at court rates.

(15) On behalf of the 1st and 4th respondents, written submissions were filed herein on 5th October 2022 by Mr. Kariuki, Advocate. He proposed a single issue for determination, namely, whether the appellant is entitled to damages. He submitted that the appeal is vexatious, bad in law and an abuse of the process of the Court. Relying on Stephen Gachau Githaiga & Another v Attorney General (supra), Mr. Kariuki directed the attention of the Court to paragraphs 8, 10 and 11 of the lower court's judgment to demonstrate that the reasoning of the trial court was sound; and that the learned magistrate took into account the ingredients of the tort of malicious prosecution. He similarly relied on Civil Appeal No. 115 of 2016: Douglas Odhiambo Apel & Another v Telkom Kenya Limited for the proposition that the decision to charge and prosecute the appellant was taken by the police and the 3rd respondent; and therefore that it was wrong to fault the 1st and 4th respondents merely for reporting a crime.

(16) Mr. Kariuki further defended the decision of the lower court for holding that the appellant could not maintain a claim on behalf of Kasuku Tea Packers Limited, which is a separate legal entity capable of suing for the same on its own name. He relied on Salomon v Salomon and Moir v Wallerstainer [1975] 1 AllER 857 to augment his argument. Thus, counsel urged the Court to find that the appeal lacks merit. He consequently prayed for its dismissal with costs to the 1st and 4th respondents.

(17) The 2nd and 3rd respondents' written submissions were filed herein on 31st August 2022 by the Attorney General in which the following issues were proposed for determination:

(a) Whether the appellant proved the claim for malicious prosecution;

(b) Whether the reliefs sought before the lower court should have been granted.

(18) The Attorney General relied on Mbowa v East Mengo District Administration [1972] EA 352 in which the 4 elements of malicious prosecution were discussed and urged the Court to find that, although the appellant proved that he was arrested by the police, charged and prosecuted after which he was acquitted, he failed to prove that his prosecution was without reasonable or probable cause. The Attorney General also relied on Hicks v Faulkner [1878] 8 QBD 167 and Simba v Wambari [1987] for the import of the phrase "reasonable and probable cause" and added that, in the circumstances of this case, it was reasonable and probable for any ordinary and prudent man to link the missing bags of tea with the appellant since they were recovered from the appellant's go-down.

(19) On the fact that the appellant was acquitted under Section 215 of the Criminal Procedure Code, the Attorney General relied on Jacob Oriando v Kenya Hospital Association Ltd t/a Nairobi Hospital [2019] eKLR to support the argument that an acquittal per se is not proof of malice; and that spite or ill-will must be proved. Thus, the Court was urged to find that the appellant had failed to prove his case before the lower court on a balance of probabilities.

(20) I have carefully perused and considered the grounds of appeal as set out in the appellant's Memorandum of Appeal. I have likewise perused and considered the Record of Appeal and the written submissions filed herein on behalf of the parties. This being a first appeal, I am mindful that it is the duty of the Court to re-evaluate the evidence adduced before the lower court with a view of satisfying itself that the decision was well-founded; while bearing in mind that, unlike the lower court, this Court did not have the advantage of seeing or hearing the witnesses. In Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was aptly expressed thus:

> " ...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 retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."(also see Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another, supra)

(21) The proceedings of the lower court show that the appellant testified on 1st February 2021 to the effect that he is the proprietor of Kasuku Tea Packers. He stated that, on the 11th May 2015 he was in Nakuru when he received a telephone call from his neighbours that his go-down had been broken into by police officers and 181 bags of tea seized therefrom. He then proceeded to Mombasa and visited Changamwe Police Station armed with receipts with a view of claiming back his tea. Instead he was required to record a statement, after which he was released on cash bail of Kshs. 100,000/= with instructions to appear before court on 14th May 2015.

(22) The appellant further testified that he was charged with the offence of breaking into a building and stealing bags of tea leaves; a charge he denied. He was ultimately tried and acquitted of the charge. Hence, his postulation was that no investigations were conducted by the police to ascertain how he came to have the 181 bags of tea leaves. He also mentioned that, although the tea leaves were returned to him in 2018 after the conclusion of the case, the produce was already damaged and could not be sold. He therefore testified that he suffered loss of business due to his arrest and malicious prosecution by and at the instance of the respondents.

(23) On behalf of the 1st and 4th respondents, Elijah Nyamweya (DW1) testified in his capacity as the security officer of the 4th respondent. His evidence was that on or about 2nd May 2015, four trucks made deliveries of bags of tea on behalf of the 4th respondent to the 1st respondent's go-down at Miritini Annex 1, located at Jomvu Area within Changamwe District. He added that, on 4th May 2015 he received information from the security guards that, in one of their warehouses at Miritini, padlocks securing the premises had been changed under mysterious circumstances. He promptly reported the matter to Changamwe Police Station and took police officers to the scene. After the police carried out their procedural checks, they entered the premises and undertook a stock check. It was then established that 792 bags of tea, valued at Kshs. 17,903,837/=, were missing.

(24) DW1 further testified that it was against the foregoing backdrop that the Police launched their independent investigations without any direct or indirect influence from the 4th respondent. He added that the 4th respondent was later informed of the recovery of 181 bags of tea in a store in Saba Saba area that was suspected to have been stolen from the 4th respondent's warehouse; and that the store in question was operated by the appellant, trading as Kasuku Tea Packers Limited. DW1 concluded his statement by asserting that the Police, upon conducting their independent investigations, made a decision to arrest a number of people, including the appellant; and that the 4th respondent merely

discharged its duty, like every law abiding citizen would ordinarily do, by reporting the matter to the Police. He accordingly prayed for the dismissal of the lower court suit.

(25) From the foregoing summary of evidence and the written submissions filed herein by learned counsel, the issues arising for determination from the appellant's Memorandum of Appeal are as follows:

(a) Whether the elements for the tort of malicious prosecution were established by the appellant.

(b) Whether the trial court travelled outside the bounds of the parties' pleadings and thereby made a determination of issues not pleaded or canvassed by them.

(c) Whether the trial court erred by failing to assess damages notwithstanding the dismissal of the suit.

(a) On whether the elements for the tort of malicious prosecution were established by the Appellant:

(26) The tort of malicious prosecution is defined as being an arrest and prosecution of a claimant the without reasonable and/or probable cause. Thus, the four elements of the tort of malicious prosecution were aptly stated by the Court of Appeal for Eastern Africa in Mbowa v East Mengo District Administration (supra) thus:

> " ...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 originated in the medieval writ of conspiracy which was aimed against combinations to abuse legal procedure, that is, it was aimed at the prevention or restraint of improper legal proceedings...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; (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 that he must have acted, in instituting criminal proceedings, with an improper and wrongful motive, that is, with an intent to use the legal process in question for some other than its legally appointed and appropriate purpose; 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...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 requirements 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.

(27) Similarly, in Murunga v Attorney General (1979) KLR 138 the 4 prerequisites were summarised thus: -

(a) That the prosecution was instituted by the defendant or by someone for whose acts he is responsible.

(b) That the prosecution terminated in the plaintiff's favour.

(c) That the prosecution was instituted without reasonable and/or probable cause.

(d) That the prosecution was actuated by malice.

(28) I agree with the finding in Attorney General v Peter Kirimi Mbogo & Another, Meru Civil Appeal 52 & 56 of 2020 (Consolidated) [2021] eKLR, that the four elements apply conjunctively and must all be proved in order to successfully claim for damages for malicious prosecution.

(29) In the instant matter, it is not in dispute that the 1st and 4th Respondents made a complaint at Changamwe Police Station concerning bags of tea leaves that were allegedly stolen from the 4th respondent's warehouse. There is also no dispute that following that complaint, the appellant and 4 others were arrested and charged in Mombasa Chief Magistrate's Criminal Case No. 839 of 2015: Republic v Joseph Kimathi Ikiamba & 4 Others with the offence of breaking into a building and committing a felony contrary to Section 306(a) of the Penal Code with an alternative count of handling stolen property. It is also common ground that Criminal Case No. 839 of 2015 was heard and that all the five (5) accused persons were acquitted of the charges. The finding of the trial court was that the allegations against the accused persons were not proved beyond reasonable doubt as by law required. Thus, the lower court was correct in its finding that the appellant's prosecution was instituted by the respondents; and that the proceedings were terminated in the appellant's favour by way of an acquittal.

(30) Hence, the nub of this appeal is whether the appellant's prosecution was instituted without reasonable or probable cause; and whether it was actuated by malice. In the case of Hicks v Faulkner (1878) 8 Q.B.D 167 at 171, Hawkins, J. expressed himself thus as to what amounts to reasonable and probable:

> " An honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which assuming them to be true, would reasonably lead any ordinarily prudent and cautious man placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed."

(31) Similarly, in Simba v Wambari (supra) it was held:

> " ...The Plaintiff must prove that the setting of the law in motion by the Inspector was without reasonable and probable cause...if the inspector believed what the witnesses told him then he was justified in acting as he did and I am satisfied the plaintiff has not demonstrated that he did not believe them or alternatively that he proceeded recklessly and indifferently as to whether there were genuine grounds of prosecuting the plaintiff or not..."

(32) In the case at bar, the appellant alleges that there was no reasonable or probable cause for criminal charges to be preferred against him. According to the appellant, he explained to the Police at the first opportunity available that he purchased the tea leaves from a public auction and had the requisite receipts to prove the same; which explanation was ignored by the respondents. It was further the contention of the appellant that the police officers broke into his warehouse to confiscate the alleged stolen tea leaves in disregard of the provisions of Sections 57 and 60 of the *National Police Service Act*, No. 11A of 2011. He added that this contravention was proof enough that the Police were fishing for information and did not have any reasonable or probable cause to arrest or charge the appellant.

(33) Needless to say that not every prosecution that is concluded in favour of an accused person necessarily leads to a successful claim for malicious prosecution. DW1 testified that, although he reported the incident of theft to the Police, the investigations that led to the arrest of the appellant were carried out independently by the Police; and that the 1st and 4th respondents were only informed that bags of tea leaves believed to have been stolen from the 4th respondent's go-down were recovered in Saba

Saba area in a store belonging to the appellant. Thus, the burden of proof was on the appellant to demonstrate that the respondents' actions were fuelled by malice. Indeed, in James Karuga Kiiru v Joseph Mwamburi & 3 Others [2001] eKLR, it was held:

> " To prosecute a person is not prima facie tortuous but to do so dishonestly or unreasonably is. And the burden of proving that the prosecutor did not act honestly or reasonably lies on the person prosecuted."

(34) A careful consideration of the evidence presented before the lower court shows that the appellant did not demonstrate that the 1st and 4th Respondents knew him beforehand or that they otherwise specifically targeted him for arrest. It is clear therefore that he was arrested in the normal course of independent police investigations in which neither the 1st nor 4th respondent played a part.

(35) Regarding the appellant's claim that the police failed to conduct proper investigations and in particular the assertion that he produced receipts to justify his claim that he acquired the impounded tea honestly by way of purchase, I note from the trial court's decision in Criminal Case No. 839 of 2015 at paragraph 5, that the prosecution adduced evidence in court which was considered and evaluated. In particular, the trial magistrate noted that:

> " The 5th accused person claimed the tea was his. He handed some receipts which could not tally with what he had in the stores. He said he blended the tea leaves. The receipts dated back to 2014 when the incident happened in 2015..."

(36) In the premises, it cannot be said that either the 2nd or 3rd respondent had no basis for arresting and charging the appellant, or dismissing his defence which was premised on the receipts. Moreover, Sections 57 and 60 of the *National Police Service Act*, merely support the position that police officers have the power to enter and search premises without a warrant of arrest, and to break open any inner or outer door or window if necessary, to facilitate their investigation so long as they have a reasonable cause to believe an offence has been committed, and if obtaining a warrant to enter and search those premises would likely imperil the success of the investigation. In the circumstances, there is nothing unlawful about the fact that police officers broke into the appellant's store for purposes of investigation. To the contrary, there is credible proof that the arrest and prosecution of the appellant was precipitated by reasonable and probable cause.

(37) On the question of whether the prosecution was actuated by malice, the appellant singled out the fact that the respondents opted to have the tea sampled and tested in a private chemist as opposed to the Government Chemist as proof enough that his prosecution was actuated by malice. However, in the case of James Karuga Kiiru v Joseph Mwamburi & 2 others [2001] eKLR it was held: -

> " ...To prosecute a person is not prima facie tortious, but to do so dishonestly or unreasonably is. Malicious prosecution thus differs from wrongful arrest and detention, in that the onus of proving that the prosecutor did not act honestly or reasonably, lies on the person prosecuted..."

(38) It is significant therefore that malice must be shown to have emanated from the prosecutor and not the complainant, unless collusion is alleged. In this case no such proof was availed; and whereas it was reckless on the part of the Police to involve a private chemist in the testing of the samples, there is no indication that the private chemist had knowledge of the reason for the test or the parties involved. I therefore find no reason to fault the trial court for the finding that the appellant failed to prove malice on the part of either the 2nd or 3rd respondent.

(b) On whether the trial court made a determination of issues not raised in the pleadings:

(39) It is a cardinal principle of law that issues for determination in any given case must flow from the pleadings. Hence, in Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others [2014] eKLR, the Court of Appeal quoted with approval the following excerpt from the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC S.C. 91/2002:

> "...it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded...
>
> ...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

[40] Similarly, in Kenya Airports Authority vs. Mitu-Bell Welfare Society & 2 Others [2016] eKLR, the Court of Appeal, while discussing the same point, cited with approval, the following excerpt from an article by Sir Jack Jacob entitled "The Present Importance of Pleadings" published in [1960] Current Legal Problems, at page174:

> "As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce on any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice...
>
> In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

(41) Lastly, in Raila Amolo Odinga & Another v IEBC & 2 Others, [2017] eKLR the Supreme Court of Kenya also quoted from the decision of the Supreme Court of India in Arikala Narasa Reddy v Venkata Ram Reddy Reddygari & Another, Civil Appeal Nos. 5710-5711 of 2012 [2014] 2 S.C.R. as follows:

> "In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the

court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings…"

(42) Counsel for the appellant relied on the persuasive case of Teenwise Media Limited v Kenatco Taxis Limited & Another (supra) for similar propositions of law to support her argument that the trial magistrate erred when he made a determination that the claim for special damages could not be maintained as the receipts relied on were issued in the name of Kasuku Tea Packers Limited. The appellant contends that the issue was raised suo motu in the judgment, and that the parties herein did not have an opportunity to discuss it. In other words, it was the appellant's assertion that parties are bound by their pleadings and that the question of locus standi was not raised by the respondents in their pleadings and ought not have been determined by the court.

(43) Hon. Mwera, J. (as he then was) discussed the issue of suo motu at length in the case of Nagendra Saxena v Miwani Sugar Company (1989) Limited (Under Receivership) Kisumu HCCC No. 225 of 1993. He relied on Habig Nig Bank Limited v Nashtex International Nig Ltd Nigeria Court of Appeal Kaduna Division CA/K/13/04 and Playing God: A Critical Look At Sua Sponte Decisions By Appellate Courts, By Adam M Milani and Michael R. Smith, Tenessee Law Review {VOL. 69 XXX 2002} and held thus:

" The term suo moto is a Latin term meaning "on its own motion" and it is approximately an equivalent of the term "sua sponte" (Latin) which means, "of one's own accord". The term defines one acting spontaneously without prompting from another party. Blacks Dictionary defines "sua sponte" as "of his or its own will or motion, voluntarily and without prompting or suggestion". In our jurisdiction action "suo motu" or "sua sponte" for the two mean the same thing, a judge or court in a given case takes a course or decision without prior motion or request from the parties. Usually the matter being decided suo motu or sua sponte is not in the pleadings, briefs, submissions, issues and evidence placed before the court for determination. For that is the essence of the adversarial systems where the parties direct the course of the litigation that brought them to court while the judge plays the referee. He/she hears them and makes a decision. In matters suo motu the court usually on perusing the file before it comes by a matter that is of the essence of the case but not raised by the parties. It could be a matter of law or procedure or other. Then that is considered by the judge who rules on it. The better course in matters dealt with sua sponte is to notify the parties to the cause of the point(s) in question, inviting them to submit on it, before a ruling/finding is arrived at. There is no dispute that the fundamental premise of the adversary process is that the advocates do uncover and present more useful information and arguments to the decision-maker than would be developed by a judicial officer acting on his own in an inquisitorial system. Accordingly most lawyers probably never think about a possibility that a court will decide a case or an issue that the court itself raises and which was neither briefed nor argued by the parties. But it happens and it is known as sua sponte. Once a court raises an issue sua sponte the court can go about deciding it in one of two ways. First, it can involve the parties and request that they submit briefs on the issue to assist the court in reaching a decision. In this context, while the issue may be raised sua sponte the decision on the issue is made in accordance with the principles and traditions of the adversarial system. Alternatively, the court can decide the issue on its own without the input from the parties. In this context, the issue is not only raised sua sponte, but is also decided sua sponte. The proper approach to decide sua sponte issues is the former approach – the approach that involves the parties in the decision-making process…It is not in doubt that hearing parties on issues sua

sponte or suo motu is better favoured since the parties have been heard before a decision... Even when a court raises a point suo motu the parties must be given an opportunity to be heard on the point particularly the party that may suffer a loss as a result of the point raised. The law is well settled that on no account should a court raise a point suo motu, no matter how clear it may appear to be, and proceed to resolve it one way or the other without hearing the parties...If it does so, it will be in breach of the parties right to fair hearing."

(44) It is plain therefore that a suo motu issue is one not raised in the pleadings, evidence and submissions. With the foregoing in mind I have paid attention to the pleadings filed by the parties before the lower court and noted that the issue of an award special damages was pleaded by the appellant at paragraph 13 of the Amended Plaint. Besides, the appellant himself relied receipts bearing the name of the company in support of his claim for special damages thereby bringing into focus the issue whether he had proved his case in that regard. Copies of those receipts can be seen at page 13 of the Record of Appeal and they leave no doubt at all that they were issued in the name of Kasuku Tea Packers. It is also plain that one of the documents exhibited by the appellant before the lower court was a Certificate of Incorporation in proof of the fact that Kasuku Tea Packers Limited is a duly registered limited liability company.

(45) In the circumstances, it cannot be argued that the issue of the receipts and whether the appellant, as an individual director, had the locus standi to claim special damages for the damaged bags of tea on behalf of the company, was raised and decided sua sponte by the trial magistrate. Consequently, it is my finding that the learned magistrate was correct in concluding, as he did, that the appellant lacked the locus standi to claim special damages for loss of 181 bas of lea leaves, which in fact belonged to a limited liability company, namely, Kasuku Tea Packers Limited. The decision was well attuned to settled precedent in this area of the law. For instance, in Salomon & Co. Ltd v Salomon (supra) it was held:

> "The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act..."

(46) Likewise, in Moir v Wallerstainer (supra) Lord Denning held:

> "It is a fundamental principle of our law that a company is a legal person with its own corporate identity, separate from the directors or shareholders and with its own property rights and interest which alone it is entitled. If it is defrauded by a wrongdoer, the company itself is the one person to sue for the damage. Such is the rule in Foss versus Harbottle...The rule is easy enough to apply when the company is defrauded by outsiders. The company itself is the only one who can sue."

(47) The principle was further underscored by the Court of Appeal in Gitobu Imanyara & 2 Others v Attorney General [2016] eKLR and it is noteworthy that the learned magistrate relied on this authority to back up his conclusion. Here is what the Court of Appeal had to say in similar circumstances:

> "...we reiterate that it is settled law that a company is a separate legal entity from its owners and has a right to sue and be sued as a separate and distinct personality. It is a principle enunciated in the age old case of Salomon (supra), the law does not allow the shareholder of a company

to bring an action for losses and damages suffered by the company. The proper plaintiff in an action arising out of losses and damages suffered by the company is the company itself."

(48) In the premises, it cannot be said that the trial magistrate made a determination of an issue that was neither raised by the parties in their pleadings nor in their evidence. Thus, the second issue is accordingly hereby resolved in favour of the respondents.

(c) Whether the trial court erred in not assessing damages that it would have otherwise awarded:

(49) In ground 5 of his Memorandum of Appeal, the appellant took issue with the fact that the trial court failed to assess damages that would have otherwise been payable to the appellant. A perusal of the judgment of the lower court dated 9th July 2021 confirms this posturing. No doubt that was a misdirection. The obligation of a court of first instance to assess damages that would have otherwise been payable, even where liability is not established, cannot be overemphasized. This obligation was restated by the Court of Appeal in Andrew Mwori Kasaya v Kenya Bus Service [2016] eKLR thus:

> " ...the rationale or otherwise of assessing damages even where they are withheld by the trial court was succinctly set out by the court in Mordekai Mwangi Nandwa versus Ms. Bhogals Garage Ltd Civil Appeal No 124 of 1993 (UR). The court made the following observations on this issue:
>
> > "The judge was clearly under a legal duty to assess the damage she would have awarded to the appellant if he (judge) had found for him. That was in compliance with this court's then repeated directions to trial Judges to proceed in that manner so as to obviate the need for sending back a case to them to assess damages in the event of this court allowing an appeal. The practice of assessing damages by a trial judge irrespective of whatever his findings are does not and cannot mean that such a judge is writing an alternative judgment"
>
> This principle has religiously been followed by the courts below..."

[50] In his submissions in the subordinate court, the appellant sought Kshs. 1,500,000/= Million as general damages for loss and damage suffered as result of malicious prosecution. He reiterated those submisisons before this Court, although no particular authority was cited by his counsel to justify the proposal. In the same vein, neither counsel for the respondents touched on that aspect of the appeal in their written submissions. Consequently, I have taken into account that in Michael Ochieng Odera v Attorney General, an award of Kshs. 200,000/= for malicious prosecution was enhanced by Hon. Aroni, J. to Kshs. 500,000/=. And, in Douglas Odhiambo Apel & Another v Telkom Kenya Limited (supra), the Court of Appeal, in a decision rendered on 24 January 2014, was of the view that Kshs. 50,000/= would have sufficed to each of the two appellants as general damages for malicious prosecution. In the premises, I would have the sum of Kshs. 100,000/= a reasonable award for false imprisonment and malicious prosecution had the appellant succeeded in his claim.

(51) In the result, it is my finding that the appeal lacks merit. It is hereby dismissed. Granted the nature of the appeal, it is hereby ordered that each party bears own costs thereof.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 25TH DAY OF AUGUST, 2023

OLGA SEWE

JUDGE