



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL SUIT NO. 11 OF 2016

JOSHUA CHARO KAZUNGU.....PLAINTIFF

-VERSUS-

THE HON. ATTORNEY GENERAL.....DEFENDANT

Coram: Hon. Justice Reuben Nyakundi

Mr. Otara Advocate for the Plaintiff

Ms. Munyuny Advocate for the Defendant

JUDGEMENT

Introduction

Joshua Charo Kazungu, through his advocate, filed the instant suit by way of a plaint dated 16th June 2016. Essentially, he seeks redress from the court on the basis that owing to the provisions of **Section 15 of the Penal Code, Cap. 63 Laws of Kenya**, he ought not to have been arrested, charged, prosecuted and convicted in **Malindi Chief Magistrate's Court Criminal Case No. 1666 of 2007**. He further maintains that the failure by the Defendant to accord him state protection as he was performing his official duties and legal representation upon his prosecution renders them liable for damages. It is on the basis of the foregoing that he urges the court to grant him the prayers enumerated below:

- a. A declaration that the Plaintiff as the Chairman of the Land Disputes Tribunal was not liable to any criminal proceedings against him and could not be charged in a criminal court for anything done or omitted to be done by him in exercise of his judicial functions under Section 15 of the Penal Code, Cap 631 laws of Kenya.*
- b. A declaration that the criminal proceedings and charges in Malindi Chief Magistrate's Court Criminal Case No. 1666 of 2007 against the Plaintiff was null and void.*
- c. A declaration that the plaintiff is entitled for both special damages and General damages.*
- d. Costs to this case.*
- e. Interest at court rate on 4 and 5 above.*
- f. Any other relief this Honourable Court may deem fit to grant in the circumstances.*

The Plaintiff's Gravamen

Per the Plaintiff, by Gazette Notice No. 8344 of 21st November, 2003, he was appointed Chairman of Malindi Land Disputes Tribunal. On or about the 22nd September 2004, he and his tribunal members heard a Land Dispute between Lenox Safari Magego and Julius Kitsao Magego versus David Mtengo Mwadai, Reuben and Ibrahim Mwadai. The Tribunal made its award and forwarded it to the Magistrate's Court where the award was read and adopted as judgment of the court in **Malindi Principal Magistrate's Court Land Case No. 11 of 2005**.

It is the Plaintiff's case that after this matter had been finalised, he was arrested and charged in **Malindi CMC Criminal Case 1666 of 2007** despite apparent assurances from the Attorney General made in **Malindi Land Case No. 11 of 2007** that he ought not to have been charged

having been in conduct of his official duty.

He further avers that under Section 15 of the Penal Code, he was not criminally responsible for anything done or omitted to be done by him in the exercise of his judicial functions, although the act done is in excess of his judicial authority or although he is bound to do the act omitted to be done.

The Plaintiff charges that the state did not avail any state defence by assigning a state counsel to defend him in the criminal matter for which he had to engage the services of an advocate at his own cost. He admits that he was ultimately convicted and sentenced to 21 months in jail or an alternative fine of Ksh. 70,000/- which he duly paid to secure his freedom. However, for the Plaintiff, due to the government's failure to chip in he suffered special damages to the tune of Ksh 450,000/- which he outlined in his plaint as follows:

a. Legal fees paid to lawyer - Ksh. 250.000/-

b. Total expenses of traveling to Malindi to attend Court on hearing and mentions for six (6) years together with subsistence – Ksh. 3000/-

c. Fine paid – Ksh. 70,000/-

The Plaintiff further claims general damages for being held in detention during the pendency of the Criminal case for eight days after judgment in the Criminal Case, eleven days before being released on bond and three days before he was arraigned in Court.

It is on the basis of the above that the Plaintiff seeks the reliefs enumerated above.

The Defendant's Retort

The Defendant is categorical that the suit as filed does not disclose any reasonable cause of action as against the defendant. It is incompetent, bad in law, frivolous, vexatious, an abuse of the Court Process and ought to be dismissed with costs.

While admitting that indeed **Malindi Principal Magistrate's Court Land Case No. 11 of 2005** adopted the purported award of the Land Dispute Tribunal in the **Land Dispute No. 18 of 1998**, the Defendant avers that the award was however upon diligent investigations and scrutiny by the Police found to have been a result of forgery.

The Defendant goes on to state that the Plaintiff was arrested and charged on suspicion of having committed forgery and for breach of Trust by person employed in the Public service contrary to various provisions of the penal code and the Plaintiff was duly prosecuted by the State in good faith, convicted and sentenced. According to the Defendant, the said criminal acts ousted the Plaintiff's conduct from the scope of official duty and the plaintiff was in the circumstances not entitled to legal representation by the Defendant.

In the Defendant's view, the Plaintiff has not suffered any loss and damage as a result of any failure on the Defendant's part as alleged or at all.

The Defendant avers that the matters raised by the Plaintiff are Res Judicata arguing that they were conclusively and finally determined by a Court of competent jurisdiction in Criminal Case No.1666 of 2007 alluded to by the Plaintiff.

It is further denied that the Plaintiff is entitled to General and/or special damages and that the decision to hire private lawyers was exclusively the Plaintiff's and was not influenced by the Defendant herein hence the Plaintiff remains personally responsible in the circumstances.

The Plaintiff's Submissions

Mr Otara formulated the following issues for determination:

a. Whether or not the plaintiff was the chairman of the Malindi land disputes tribunal

b. Whether or not Malindi land disputes tribunal is a quasi judicial body?

c. Whether or not the chairman of the Land Disputes Tribunal is a judicial officer?

d. Whether or not Section 15 of the Penal Code was applicable to the plaintiff herein?

e. Whether or not the plaintiff ought to have been subjected to criminal proceedings?

f. Whether or not the Plaintiff is entitled to the prayers sought in the Plaintiff?

g. What order as to costs?

On the first issue it is submitted that the Plaintiff was the chairman of the Malindi Land Disputes Tribunal by virtue of an appointment made vide Gazette Notice on 21st November 2003.

As for the second issue, it is submitted that the Malindi Land Disputes Tribunal was a judicial body within the meaning of **Article 169(1)(d) of the Constitution of Kenya, 2010** as it was established under the **Land Disputes Tribunal Act number 18 of 1990**.

On the third issue it is submitted that the Plaintiff, as the chairman of the Land Disputes Tribunal, was a judicial officer within the meaning of **Article 161(1) of the Constitution**. It is reasoned that the chairman of the land disputes Tribunal established by an Act of Parliament is ranked as a magistrate of the subordinate Court hence the Plaintiff was a judicial officer.

Turning to whether **Section 15 of the Penal Code** was applicable to the plaintiff, it is submitted that having established that the plaintiff was a judicial officer, **Article 160(5) of the Constitution and Section 15 of the Penal Code** were applicable to him in respect of his duties as the chairman of Malindi Land Disputes Tribunal.

For the fifth issue it is submitted that by the Defendant's own admission in Malindi Land case No. 11 of 2007, the Plaintiff ought not to have been held criminally liable. That the law of Estoppel does not allow the Defendant to renege on his statements and arguments presented in a court of law.

Regarding whether the Plaintiff is entitled to the prayers sought it is submitted that he is by virtue of the provisions of Article 160 (5) and Section 15 of the Penal Code precluding him from prosecution. Mr Otara therefore submits that the Plaintiff is entitled to the special damages as claimed together with interest at the rate of 14% per annum. He further contends that his client is due general damages to the tune of Ksh. 6,000,000/- basing this figure on **Joseph Wamoto Karani vs C. Dorman Limited & Another(2018) eKLR**.

In closing, Counsel urged the court to grant the Plaintiff costs and to allow the suit as prayed.

The Defendant's Submissions

Ms. Munyuny conducting the defence on behalf of the Attorney General takes the view that the court ought to adjudicate upon the following issues:

a. Whether the Plaintiff was not liable to any criminal proceedings against him in the exercise of his judicial functions pursuant to Section 15 of the Penal Code Cap 63 Laws of Kenya

b. Whether the criminal proceedings and charges in Malindi Chief Magistrates Court Criminal Case No. 1666 of 2007 against the plaintiff should be declared null and void

c. Whether the Plaintiff is entitled for both Special damages and General damages

Submitting on whether the Plaintiff was not liable to any criminal proceedings against him in the exercise of his judicial functions pursuant to **Section 15 of the Penal Code Cap 63 Laws of Kenya**, Ms. Munyuny makes reference to the provision in question and cites the **Judicial Service Act, 2011** for a definition of who is a judicial officer. Having done so, Ms. Munyuny submits that the Plaintiff was required to serve with diligence, honesty and integrity as a member of the Malindi Land Disputes Tribunal. She further submits that the said criminal acts of the Plaintiff ousted his conduct from the scope of official duty and the plaintiff was in the circumstances not entitled to any legal representation by the Hon. Attorney General.

It is submitted that the plaintiff was arrested and charged on suspicion of having committed forgery and for breach of Trust by person employed in the Public service contrary to various provisions of the Penal Code. It is further submitted that the Plaintiff was duly prosecuted by the State in good faith convicted and sentenced. That the Plaintiff deliberately acted in excess and outside the judicial scope bestowed upon him to benefit his co-accused persons. In the circumstances, it is submitted, the plaintiff was personally liable to criminal proceedings for criminal actions committed either within the scope of his duty or in his personal capacity. On this line of argument, reliance is placed on **Philomena Mbete Mwilu -vs- Director of Public Prosecutions & 3 others: Stanley Muluvi Kiima (Interested Party): International Commission of Jurists Kenya Chapter (Amicus Curiae) [2019] EKL**R and **Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & 5 Others 2016 eKLR**. Further reliance is placed on the article titled '**Judicial Immunity from Civil and Criminal Liability' (1990) 27(1) San Diego Law Review 1: by Jeffrey M. Shaman**.

Counsel for the Defendant submits that Section 15 of the Penal Code does not exempt judicial officers from facing criminal charges for criminal conduct and as such the Plaintiff cannot claim judicial immunity in commission of the said offences.

In addition to the foregoing, on behalf of the Defendant it is submitted that all the matters raised herein are Res judicata the same having been conclusively and finally determined by a Court of competent jurisdiction in Criminal Case 1666 of 2007.

Addressing the Court on the issue of whether the criminal proceedings and charges in Malindi Chief Magistrates Court Criminal Case No. 1666 of 2007 against the Plaintiff should be declared null and void, Ms. Munyuny submits that no reasonable cause has been given to warrant the quashing of the criminal proceedings and charges. It is submitted that based on the facts on record it is outside the realm of this Honourable courts power to adopt the version of one of the parties as opposed to the other as that would be trespassing into the jurisdiction of the trial court and usurping the role of the investigating officer and the DDP. This argument is buttressed by inviting this court to consider the decision of the Court in **Hussein Khalid and 16 others v Attorney General & 2 others [2014] KLR**. Counsel also cites in support of her submission the **Philomena Mwilu case(supra)** and further submits that the decision of the court in Criminal Case 1666 of 2007 ought to be affirmed by this court.

As to whether the Plaintiff is entitled to the special and general damages in the nature claimed, it is submitted that he is not as not only are the matters raised herein res judicata, but he has failed to prove his entitlement. Reliance is placed on **Moi Educational Center Limited vs**

William Musembi & 16 Others [2017] eKLR.

It is on the back of the above arguments that this Court is urged to dismiss the Plaintiff's suit with costs.

Analysis and Determination

The arguments made by both Mr. Otara and Ms. Munyony, the evidence on record and the parties' respective pleadings influence the conclusion of this Court that the instant suit turns on whether, as claimed by the Plaintiff, he was precluded from prosecution in **Malindi CMC Criminal Case 1666 of 2007** on the strength of **Section 15 of the Penal Code**.

If I am to find in the affirmative on the above issue, it would then be incumbent on the court to make a finding on whether the proceedings in **Malindi CMC Criminal Case 1666 of 2007** ought to be declared null and void. Corollary to the foregoing would be a finding on both special and general damages.

In contrast to the preceding summation, should I reach the determination that the Plaintiff cannot bring his circumstances under the umbrella of the impugned provision, then the court need not expend any more judicial ink on the matter.

Bearing the preceding rendition in mind, I now turn to **Section 15 of the Penal Code**, which states:

“Judicial Officers

15. Except as expressly provided by this Code, a judicial officer is not criminally responsible for anything done or omitted to be done by him in the exercise of his judicial functions, although the act done is in excess of his judicial authority or although he is bound to do the act omitted to be done.”

As far as case law is concerned, the authorities that follow are illuminative. To begin, in **Philomena Mbeti Mwilu v Director of Public Prosecutions & 3 others; Stanley Muluvi Kiima (Interested Party); International Commission of Jurists Kenya Chapter (Amicus Curiae) [2019] eKLR** it is held as follows:

“However, if acts of a criminal nature are committed outside the scope of official judicial function, the judge or judicial officer can be investigated, arrested and prosecuted directly, without recourse to the disciplinary or removal process. Accordingly, serious offences such as theft, fraud, arson, rape or murder fall in the latter category

By way of illustration of this position, in 2008, Justice GBM Kariuki was arrested and charged with the offence of attempted murder and causing grievous bodily harm, contrary to sections 220 and 234 of the Penal Code in Nairobi Magistrate's Court Criminal Case No. 1655 of 2009. He was a sitting judge of the High Court at the time of the alleged offence, and at his arrest and arraignment. While there was a removal process under section 62 of the former constitution, he was arrested, charged and prosecuted directly without recourse to the removal process.”

Discussing the extent of immunity, the Court in **Edgar Kagoni Matsigulu & 4 others v Director of Public Prosecutions & another; Law Society of Kenya & another (Interested Parties) [2019] eKLR** held:

“The immunity of a judicial officer is absolute but only to the extent that it is in conformity with the good-faith based, lawful performance of their judicial functions. Where however a judicial officer goes out on a frolic of his own, to the extent of going beyond the constraints of what can be considered as their judicial function, he/she opens themselves up to liability.”

In **Bryan Mandela Khaemba vs Chief Justice and President of the Supreme Court of Kenya & Another [2019] eKLR**, it is held:

“The Court observes that towards safeguarding the independence of the Judiciary, Article 160 (5) provides that a member of the Judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function. It is sufficient for the Court to hold that unless it is shown that a judicial officer has not acted in good faith in the lawful performance of a judicial function, the liability for anything done or omitted shall not accrue and that protection of judicial officers, in the opinion of the Court, spreads to liability in administrative disciplinary proceedings as appropriate or the case may be.”

Per Odunga J in **Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya and 5 Others [2016] eKLR**:

“A judicial officer is not immuned in respect of all actions and inactions done or omitted by himself or herself unless such omission or commission occurs in the course of performance of his or her judicial functions...It therefore follows that members of the judiciary, in carrying out their judicial functions must adhere to the dictates of the Constitution and the law. As long as they do that their actions cannot be the subject of civil and criminal litigation.”

The learned judge goes further to hold:

“116. In my view judicial immunity must be read in the context of our Constitutional framework and where the adoption of the doctrine would clearly militate against the constitutional principles that doctrine or principle must bow to the dictates of the spirit

and the letter of the Constitution and the enabling legislation and it is not only the role of the Courts to superintend the exercise of such powers but their constitutional obligation to do so. In effect the immunity accorded to the judiciary by Article 160(5) of the Constitution only remains valid and insurmountable as long as its members are exercising their functions in good faith in the lawful performance of such judicial functions.”

Essentially, the preceding decisions reveal that the purpose of judicial immunity contemplated under **Article 160(5) of the Constitution** and further in **Section 15 of the Penal Code** is to shield judicial officers from criminal prosecution for acts or omissions they engage in within the purview of their judicial functions. Here, as has been pointed out in the authorities above, it is of note that the immunity accorded under this Section is qualified. One must be a judicial officer in the first instance and the other qualification is that the act or omission under scrutiny must be one within the rubric of a judicial function. Where the act in question bears itself out as one that is beyond judicial function, immunity will cease to be available.

Juxtaposing the above exposition on the Plaintiff’s circumstances, it is difficult to see how **Article 160(5) of the Constitution** and **Section 15 of the Penal Code** would be of aid to him. While the argument he makes is that the charges filed against him in **Criminal case 1666 of 2007** are untenable seeing as he was acting in his capacity as the chairman of the Malindi Land Disputes Tribunal and therefore engaging in a judicial function, my analysis is diametrically opposed. The accusations levelled against him in **Criminal case 1666 of 2007**, charges of which he was ultimately convicted of, were to the effect that he forged the signatures of members of the tribunal of which he was head to confer a benefit on certain individuals. It stands to reason that these acts could not then and cannot now be construed as to have been within his judicial functions. As a matter of fact, such acts were criminal in nature and he therefore cannot, in my view, purport to seek shelter from prosecution on the basis of the aforesaid provisions of the law.

As the court had stated at the beginning of its determination, having found that the Plaintiff herein misapprehended the application of **Article 160(5) of the Constitution** and **Section 15 of the Penal Code** it only stands to reason that the remainder of the prayers sought in his Plaint fall by the wayside.

For the avoidance of doubt, it is the Court’s finding that as Section 15 of the Penal Code did not shield the Plaintiff from criminal prosecution, his prosecution and ultimate conviction in Malindi CMC Criminal Case 1666 of 2007 was within the four corners of the law. Regarding the special damages claimed, while it is trite that these must not only be strictly plead and proven, in the current instance, coterminous with my finding that the Plaintiff’s prosecution and ultimate conviction was proper is the determination that he has not proven his claim for special damages. I also find that the prayer for general damages fails.

In the upshot, the Plaint dated 16th June 2016 is dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 30TH DAY OF JANUARY 2020.

.....

R NYAKUNDI

JUDGE

In the presence of

1. Mr. Michira for Otara for the applicant
2. The plaintiff