



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**CIVIL SUIT NO. 1 OF 2017**

**JOHNSON MUGWE WANG'ANG'A.....PLAINTIFF**

**VERSUS**

**ISAAC MUCHIRA NJERU.....DEFENDANT**

**J U D G M E N T**

**A. Introduction**

1. This suit was instituted vide a plaint dated 18/05/2015 seeking for judgment in favour of the plaintiff for Kshs. 22,800/= for breach of contract plus interests and costs. The plaintiff averred that he entered into a land sale agreement for Plot No. Embu/ Township/70 for a consideration of Kshs. 12,000,000/= and receipt of which amount the defendant acknowledged.

2. It later emerged that the said sale agreement was fraudulent *ab initio* for the reasons that the defendant had impersonated the owner of the plot one Stanley Muriuki Joseph. That the defendant was subsequently arrested, charged, prosecuted and convicted in Embu CM's Criminal Case No. 811 of 2013 of four counts *to wit*, conspiracy to defraud contrary to Section 37 of the Penal Code; making a false document contrary to Section 347(d)(i) of the Penal Code; Personation contrary to Section 382(1) of the Penal Code and two counts of Obtaining money by false pretences contrary to Section 313 of the Penal Code. The plaintiff averred that as a result of the said conviction, the plaintiff imputed civil liability on the defendant and further that on the strength of the terms of the sale agreement between him and the defendant, the defendant was indebted to him in Kshs. 12,000,000/= plus interest therein from 12/01/2012 at the rate of 30% per annum and Kshs. 80,000/= liquidated damages.

3. The defendant entered appearance through the firm of Njiru Mbogo & Company Advocates and subsequently filed his statement of defense and counterclaim. He denied the contents of the plaint. He further averred that he was acquitted of counts 1 and 2 as had been set out in paragraph 5 of the plaint and further that he was wrongly convicted of counts 3, 4 and 5 as set out in the said paragraph of the plaint and that he had appealed against the same in Embu High Court and thus the contentions and demands made in paragraph 6 of the plaint were premature as a result of the said appeal which was pending.

4. In the counterclaim, he averred that as a result of the said incident on loss of money, he had suffered and incurred unimaginable losses due to the acts of the plaintiff and which included threats to his life and subsequent kidnap and murder of his wife. Further that the prosecution was malicious and had caused him damage to his good image and reputation and made him lose a lot in business and income. Further that the plaintiff acting in collusion with goons and police found him at a hotel and bit him and thus causing him serious injuries which caused him serious damage and almost 90% loss of function of the leg and further caused him financial loss in terms of heavy medical expenses incurred and which loss he held the Plaintiff liable. As such he prayed for judgment to be entered against the plaintiff for General damages for malicious prosecution, the injuries suffered by the defendant, all medical expenses and loss of business due to the illegal acts of the plaintiff plus costs and interests.

5. The plaintiff filed his reply to the defense and also filed his defense to the counterclaim. The plaintiff reiterated therein the contents of his plaint and denied the contents of the defendant's counterclaim.

**B. Issues for determination**

6. I have considered the pleadings herein and the submissions filed herein and it is my opinion that the main issue for determination are: -

*i. Whether the defendant was paid Kshs. 12,000,000/= by the plaintiff in a failed/fraudulent transaction.*

*ii. Whether the plaintiff is entitled to the orders sought*

iii. Whether the counterclaim for general and special damages is merited.

### C. Applicable law and determination of the issues

7. In civil cases, a plaintiff is required to prove his claim against the defendant on the balance of probabilities. This position was stated in the case of **Kirugi & Ano. –vs- Kabiya & 3 Others [1987] KLR 347** wherein the Court of Appeal stated that the burden was always on the plaintiff to prove his case on the balance of probabilities, and that such burden was not lessened even if the case was heard by way of formal proof. In the case of **D.T. Dobie & Company (K) Ltd –vs- Wanyonyi Wafula Chebukati [2014] eKLR** the court cited with approval the decision of **Denning J in Miller Vs MinisteroOf Pensions [1947]** where it was held that: -

*“The degree is well settled. It must carry a reasonable degree of probability, but not so high as required in a criminal case. If the evidence is such that the tribunal can say; we think it is more probable than not, the burden is discharged, but if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case which the tribunal cannot decide one way or the other which evidence to accept, where both parties explanations are equally unconvincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”*

8. As such, the plaintiff bears the burden of proving his claim to the balance of probabilities while the defendant has an equal burden of providing his counterclaim. By a consent dated 11/12/2019, the parties agreed to rely on their witness statements and affidavits as well as submissions in support of their claims in the suit. The plaintiff in his submissions reiterated the contents of his pleadings. The record shows that the defendant never filed his submissions despite having more than six (6) months at his disposal after being served with those of the plaintiff.

9. In his statement of evidence, the plaintiff averred that pursuant to the agreement of 12/11/2012, he paid to the defendant the said amount for the sale of plot being Embu/Township/70 but after which the defendant failed to transfer the plot to him. Following a report to the police, the defendant was arrested, charged and convicted of several offences relating to the fraudulent transaction. The plaintiff attached the sale agreement that formed part of his documents. Paragraph 3 of the said contract is to the effect that the defendant who was the vendor therein acknowledged receipt of the said purchase price for the said plot at the time of signing the agreement. The defendant despite having denied receiving the money (in his statement of defense did not deny signing of the contract and neither did he allege that this signature was forged.

10. The plaintiff's claim was based on the terms of the sale agreement between him and the defendant and pursuant to which the plaintiff averred that the defendant was indebted to him in Kshs. 12,000,000/= with interest therein from 12/01/2012 at the rate of 30% per annum and Kshs. 80,000/= liquidated damages.

11. Paragraph 7 of the said agreement provided that failure by the vendor to honour the clauses therein would render him liable to refund all the monies that the purchaser had expended in furtherance of the transaction and together with the purchase price already paid together with interest of 30% per annum plus Kshs. 80,000/= being liquidated damages. It is trite law that parties to a contract are bound by the terms of such contract. The defendant is bound by the terms of the said contract should the plaintiff prove his claim. The plaintiff's evidence is that the defendant received the whole of the purchase price as was acknowledged in the agreement and as such, he ought to be held liable to refund the said purchase price with the agreed interest at 30% per annum herein computed at Kshs. 10,800,000/= as well as the liquidated damages of Kshs. 80,000/= making a total Kshs. 22,880,000/= as claimed in the plaint.

12. In regard to the counterclaim, the defendant in his counterclaim pleaded that as a result of the incident subject to this suit, he had suffered and incurred unimaginable losses due to the acts of the plaintiff and which included threats to his life and subsequent kidnap and murder of his wife. He further pleaded that his prosecution was malicious and had caused him damage to his good image and reputation and made him lose a lot in business and income. It was further pleaded that the plaintiff in collusion with the police and goons led him to suffer financial loss in terms of heavy medical expenses incurred and which loss he held the Plaintiff liable. As such he seeks for judgment in his favour against the plaintiff for general damages for malicious prosecution; for injuries suffered; medical expenses and loss of business due to the alleged illegal acts of the plaintiff plus costs of the counterclaim and interests thereon.

13. I have already stated that the defendant being the counter-claimant is under a duty to tender evidence to prove his claim to the required standards. Save for making a host of allegations, the defendant did not adduce any evidence to support his claim. The law requires that the defendant satisfied the court as to prosecution. In the case of **Mbowa vs. East Mengo District Administration [1972] EA 352** and **Murunga vs Attorney General, [1979] KLR, 138** cited with approval by the High Court in **Tobias Moinde Kengere v Postal Corporation of Kenya & 2 others (2019) eKLR** was held that a plaintiff must prove that the prosecution was instituted by malice on part of the defendant.

14. The defendant prayed for general damages for malicious prosecution. The law relating to the tort of malicious prosecution was set out in the case of **Mbowa vs. East Mengo District Administration [1972] EA 352**, and wherein the court did set out the elements of the said tort. The Court held as thus (in relation to essentials of malicious prosecution: -

*“.....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 (emphasis mine).....** (See also **Murunga vs Attorney General, [1979] KLR, 138- Cotran, J.**)

15. As such the Defendant for him to succeed on this claim he had the duty to prove that: -

- i. *The prosecution was instituted by the plaintiff (in this case) or by someone for whose acts the plaintiff was responsible.*
- ii. *The prosecution terminated in his favour.*
- iii. *The prosecution was instituted without reasonable and probable cause.*
- iv. *The prosecution was actuated by malice.*

16. On the prosecution having been instituted by the plaintiff in this suit, I rely on the holding of Trainor J in the case of **Gitau vs. Attorney General [1990] KLR 13** stated that:

***"To succeed on a claim for malicious prosecution the plaintiff must first establish that the defendant or his agent set the law in motion against him on a criminal charge. Setting the law in motion" in this context has not the meaning frequently attributed to it of having a police officer take action, such as effecting arrest. It means being actively instrumental in causing a person with some judicial authority to take action that involves the plaintiff in a criminal charge against another before a magistrate....."***

17. From the evidence on record, it is not in dispute that the plaintiff herein made a complaint to the police against the defendant on the fraudulent transaction. The police investigated the case and arrested the defendant. It is trite that the four elements of the tort of malicious prosecution must unite for a cause of action to arise. Proof of the first element alone is not sufficient to establish a claim of this nature.

18. Was the prosecution terminated in the favour of the defendant? The evidence on record is clear that the defendant/ counterclaimant was acquitted of some of the counts in the was facing and convicted and sentenced on some counts in the criminal trial. However, he was convicted of two counts of obtaining money by false pretences totaling to Kshs. 12,000,000/= which is crucial and relevant to this suit. As such the prosecution was never terminated in its entirety in favour of the defendant.

19. Further, as it was held by the court of appeal in **Nzoia Sugar Co. Ltd v. Fungututi C.A. No. 7 of 1987,**

***"...It is trite learning that acquittal, per se, on a criminal case charge is not sufficient basis to ground a suit for malicious prosecution....."***

20. It is trite that the holding in the Nzoia Sugar Co. case applies not only to a case of malicious prosecution but to call civil suits where any of the parties may have been acquitted in a criminal case. The defendant in my considered view has failed to establish before this court that the prosecution ended in his favour.

21. The plaintiff rightly argued in his submissions that the right party to sue for malicious prosecution was the Hon. Attorney General in a proper civil suit but not to wait for the plaintiff to sue him and then put forth a counterclaim for damages for malicious prosecution. In a public prosecution, the Attorney General is the party who may be held liable in damages as respects the torts of unlawful arrest, false imprisonment and malicious prosecution.

22. In the case of **Douglas Odhiambo Apel & another v Telkom Kenya Limited Civil Appeal No. 115 of 2006,** the Court of Appeal held as thus: -

***"On the law of malicious prosecution, we do not doubt that the judge directed himself properly in holding that the claim lay as against the Attorney General alone. He was also correct in holding that the withdrawal of the suit against the Commissioner of Police and the Attorney-General meant that that claim was essentially non-suited. "***

23. However even assuming that the prosecution ended in the favour of the defendant, he has a duty to prove that the prosecution was instituted without reasonable and probable cause. In the case of **Kagane & Others -vs- The Attorney General & Another (1969E 643),** cited with approval by the High Court in **Tobias Moinde Kengere v Postal Corporation of Kenya & 2 others (2019) eKLR** Rudd J had this to say: -

***The test whether the prosecution was instituted without reasonable and probable cause is whether the material known to the prosecution would have satisfied a prudent and cautious man that the plaintiff was probably guilty of the offence.***

24. The plaintiff /defendant in the counterclaim reported an offence to the police and who carried out investigations and arrested the

defendant herein. Pursuant to the said arrest, he was arrested, charged and convicted. In my opinion there was reasonable and probable cause in the institution of the prosecution by the police and the Office of Director of Public Prosecution. The police had an honest belief in the guilt of the respondents 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 an ordinary, 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. If indeed there was no reasonable cause or no offence disclosed, the police would not have arraigned the respondents in court. Furthermore, the criminal case against the defendant ended in conviction of two counts of obtaining money by false pretences.

25. On the issue that the prosecution was actuated by malice, the defendant did not adduce any evidence to that effect. The arrest and conviction of the defendant was based on the investigations carried out by police which were sound in that they resulted in a conviction. In my considered view, the defendant did not satisfy the court on this element.

26. The defendant has not made any attempt to adduce evidence in support of any of the allegations he made against the plaintiff. He failed to demonstrate that he suffered any damages as a result of any acts of the plaintiff. The defendant was indeed the offender while the plaintiff was the victim of the fraudulent acts of the defendant.

27. I find that on the other hand, the plaintiff adduced evidence to prove that a contract for purchase of land existed between him and the defendant and that it was breached by the defendant who never delivered what he had undertaken to do in the land sale agreement. There was sufficient evidence to demonstrate that the defendant had no legal interest in the land he purported to sell. He indeed impersonated the proprietor with the intention to defraud the plaintiff a purchaser in good faith of a colossal sum.

28. The defendant argued that he lodged an appeal against conviction of the criminal charges which is yet to be determined. No single document was attached to the defendant's statement to show that such an appeal existed. Even assuming that an appeal was lodged, this civil case exists independently of the criminal charges. The acquittal or conviction in a criminal case has little or no impact on a civil case. What matters is that the plaintiff discharges the burden of proof on the balance of probabilities. The pending appeal if any, does not affect this civil suit.

29. It is imperative to note that the plaintiff's claim is based on a contract between him and the defendant. For this reason, this court has no reason to interfere with the terms of the contract as regards the agreed interest rates or the damages payable. As such the claim of the plaintiff is pegged on the terms of the contract which was produced in evidence and corroborated with further evidence contained in the statement and the list of documents.

30. It is trite law that costs follow event unless the court shall for good reason otherwise order. This is provided for under Section 27(1) of the Civil Procedure Act. The court has discretion to award interest on costs at any rate not exceeding fourteen per cent per annum. It is my considered opinion that the plaintiff is entitled to the costs and the interest on the decretal sum from the date of the judgment till full settlement.

31. It is my finding that the plaintiff has established his claim on the balance of probabilities as required by the law. Judgment is hereby entered in favour of the plaintiff at Kshs. 22,880,000/=, liquidated damages of Kshs. 80,000/= plus costs of the suit and interests at court rates from the date of this judgment.

32. I find no merit in the counter-claim and it is hereby dismissed with costs.

33. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 22<sup>ND</sup> DAY OF JULY 2020.**

**F. MUCHEMI**

**JUDGE**

**Judgment delivered and sent through email.**